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SUPREME COURT, U.S.

# TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

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No. 253

UNITED STATES OF AMERICA, PETITIONER,

vs.

CERTAIN PARCELS OF LAND IN THE COUNTY OF FAIRFAX, COMMONWEALTH OF VIRGINIA, AND BELLE HAVEN REALTY CORPORATION ET AL.

---

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Petition for Certiorari Filed August 5, 1952

Certiorari granted October 13, 1952

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

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No. 253

UNITED STATES OF AMERICA, PETITIONER,

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CERTAIN PARCELS OF LAND IN THE COUNTY OF FAIRFAX, COMMONWEALTH OF VIRGINIA, AND BELLE HAVEN REALTY CORPORATION ET AL.

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1 [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Miscellaneous No. 555

UNITED STATES OF AMERICA, *Petitioner*,

vs.

CERTAIN PARCELS OF LAND in the County of Fairfax, Commonwealth of Virginia, and Belle Haven Realty Corporation, et al. *Defendants*.

**Petition For Condemnation—Filed December 13, 1944**

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes the United States of America, by its attorneys, at the direction and under the authority of the Attorney General of the United States, pursuant to the request of the Federal Works Administrator of the Federal Works Agency of the United States, and represents unto the Court as follows:

I.

This is a suit of civil nature, brought by the above-named petitioner, under the authority of the Act of August 1, 1888, 25 Stat. 357 (U.S.C. Title 40, Sec. 257); the Act of February 26, 1931, 46 Stat. 1421 (U.S.C. Title 40, Sec. 258(a) to 258(e)); the Act of October 14, 1940, as amended (U.S.C. Title 42, Secs 1531 to 1564, inclusive), funds having been appropriated by the Act of July 3, 1941 (Public No. 150, 77th Congress); the public use for which said perpetual easements are taken is the provision of public works or equipment for public works, pursuant to said Act of October 14, 1940, as amended.

II.

That pursuant to this Act, the Honorable Philip B. Fleming, Administrator of the Federal Works Agency of the United States
2 of America has selected for acquisition by the United States of America the land hereinafter described and has designated that the perpetual easements in and to said lands to locate, construct, operate, maintain, repair, replace and remove sewer pipe lines and appurtenances in, under, through, or over said lands are suitable and necessary for the purposes of the United States and that such selection and designation and determination have been and now are in full force and effect.

III.

That the perpetual easements in and to strips of land ten feet in width are lying and being in the County of Fairfax, Commonwealth and more particularly described as follows:

3 Perpetual easements in and to strips of land 10 feet in width lying and being in the County of Fairfax, Commonwealth of Virginia, to locate, construct, operate, maintain, repair, replace and remove sewer pipe lines and appurtenances, the center lines of said strips of land being particularly described as follows:

PARCEL 1: Beginning at Station 0 plus 00 a point in the center line of a 10 foot permanent easement, said point being South 48 degrees 03 minutes West 135.83 feet, South 74 degrees 43 minutes West 122.33 feet, North 23 degrees 44 minutes West 307 feet, North 40 degrees 52 minutes West 159.76 feet, North 67 degrees 21 minutes West 188.8 feet, and North 0 degrees 03 minutes East 104.96 feet from the radius point of the circle at the end of Wakefield Court; running thence South 51 degrees 00 minutes West 100.96 feet to Station 1 plus 00.96; thence South 84 degrees 39 minutes West 279.19 feet to Station 3 plus 80.15; thence North 77 degrees 13 minutes West 237.62 feet to Station 6 plus 17.77; thence South 88 degrees 17 minutes West 399.23 feet to Station 10 plus 17; thence North 54 degrees 18 minutes West 41.60 feet to Station 10 plus 58.60, a manhole near the South line of U. S. Route No. 1, said point lies North 24 degrees 01 minutes West 101.0 feet and South 63 degrees 21 minutes West 80 feet to center line of Fairhaven Avenue, which is situated on the North side of U. S. Route No. 1, as shown by plat "Right of Way Map, Contract 3C Through Property of Belle Haven, Inc. Fairfax County, Va." dated October 1944, made by Massey & Johnson, Fairfax, Virginia, copy of which is attached to the Declaration of Taking and filed in this proceeding and by reference thereto made a part hereof.

PARCEL 2: Beginning at Station 117 plus 94.73, a manhole 10 feet South of the North line of F Street and in the center line of 15th Street which is undeveloped; running thence with the center line of 15th Street North 13 degrees 41 minutes East 938.60 feet to a point; thence North 46 degrees 37 minutes East 43.13 feet to Station 108 plus 13, a point in the property line of the Belle Haven Country Culb, as shown by plat "Plat Showing R.O.W. Taking Sta 117 + 94.73 — Sta. 108 + 13 thru Property of Belle Haven Realty Corp. Fairfax County, Virginia" dated November, 1944, made by Massey & Johnson, copy of which is attached to the Declaration of Taking filed in this proceeding and by reference thereto made a part hereof.

IV.

That the following named persons have an apparent interest in the land to be condemned:

Belle Haven Realty Corporation Fairfax County, Virginia

and all persons or owners, known and unknown, having or claiming to have any right, title, interest, lien, encumbrance or claim of any kind in or against the subject to be divided or disposed of in this proceeding, and whom this proceeding may concern, including the heirs, assigns and devisees of the above persons as may be deceased whose names and addresses are wholly unknown to the petitioner.

V.

That the County of Fairfax is a political subdivision of the Commonwealth of Virginia and may have or claim some interest in the foregoing land for taxes and assessments due and unpaid against the said land, and is hereby made a party defendant to this proceeding.

VI.

That the Commonwealth of Virginia may have or claim some interest in this proceeding and is hereby made a party defendant.

VII.

That in addition to the parties designated by name herein, there are other parties, who are, or may be, interested in this action, and who may have or claim some right, title, interest, or lien in, to or upon the real estate, or some part thereof, in this petition described, that the name of each of said parties is unknown to petitioner and upon diligent inquiry cannot be ascertained, and all such parties are therefore made parties defendant to this action by the name and description of "Unknown Owners".

VIII.

That the purpose for which petitioner is taking said perpetual easements in and to said land are necessary and suited to the public use in that they provide for the location, construction, maintenance, operation, repair, replacement and removal of sewer pipe lines in, under, through or over said lands, in the County of Fairfax, Virginia, and that the use to which said property is to be applied is authorized by law; and that it is necessary that all of said property be taken and that no part of the property herein sought to be taken and condemned has been heretofore appropriated for public use.

5 WHEREFORE, upon consideration of the premises set forth your petitioner prays as follows:

(1) For a judgment against the property described herein, including all of the rights, title and interest therein, to the sole use and benefit of the United States of America;

(2) Adjudging that the public uses for which petitioner takes and condemns said perpetual easements in and to said land are necessary public uses of the petitioner, and that the uses to which said property are to be applied are uses authorized by law, and that all of said perpetual easements in and to said land are the necessary public uses of the petitioner, and that the uses to which said property are to be applied are uses authorized by law, and that all of the said perpetual easements in and to said land taken are necessary thereto;

(3) That an order of the Court be made requiring all persons concerned, particularly those whose names are set forth in this petition, to appear at the time and place in such order to be named, to make known their objections, if any they have, and their rights, title, claims, interest, or demand against said property or improvements thereon, of their respective interests therein, or any other matters material to their respective rights;

(4) That it be ascertained in this proceeding according to law what will be just compensation for said easements in and to said land to be condemned for said uses of the petitioner, and who are the persons having ~~any right, title, interest, estate or claim in or~~ to said property and improvements if any, proposed to be condemned and entitled to compensation therefor;

(5) That the perpetual easements in and to the lands hereinbefore described will be condemned and vested in the United States of America, and that your petitioner may have such other, further, necessary and general relief as may be proper in this case;

And your petitioner will ever pray.

UNITED STATES OF AMERICA
By HARRY H. HOLT, JR.
Harry H. Holt, Jr.
*United States Attorney*

By C. J. COLLINS
C. J. Collins
*Special Assistant*
*United States Attorney*

12 (File endorsement omitted)

IN UNITED STATES DISTRICT COURT

[Title omitted]

**Declaration of Taking—Filed December 13, 1944**

I, Philip B. Fleming, Federal Works Administrator of the Federal Works Agency of the United States of America, do hereby declare that:

1. (a) The perpetual easements in and to the lands described in Schedule "A" hereto attached are hereby taken for the use of the United States under the authority of the Act of August 1, 1888, 25 Stat. 357 (U.S.C. Title 40, Sec. 257); the Act of February 26, 1931, 46 Stat. 1421 (U.S.C. Title 40, Secs. 258(a) to 258(e)); the Act of October 14, 1940, as amended (U.S.C. Title 42, Secs. 1531 to 1564, inclusive), funds having been appropriated by the Act of July 3, 1941 (Public No. 150, 77th Congress). The public use for which said perpetual easements are taken is the provision of public works or equipment for public works, pursuant to said Act of October 14, 1940, as amended.

2. A description of said easement areas sufficient for the identification thereof is set forth in Schedule "A" annexed hereto and made a part hereof.

3. The estates or interests taken for said public use are perpetual easements in and to the lands described in Schedule "A" to locate, construct, operate, maintain, repair, replace and remove sewer pipe lines and appurtenances.

4. Plans (2) showing said easement areas are annexed hereto and made a part hereof.

13 5. The sum of money estimated by me to be just compensation for said perpetual easements is set forth in Schedule "A" annexed hereto and made a part hereof, which sum I herewith deposit in the registry of this Court to the use of the persons entitled thereto.

I am of the opinion that the ultimate award of compensation for the taking of said perpetual easements will be within any limits prescribed by law to be paid as the price therefor.

IN WITNESS WHEREOF, I, Philip B. Fleming, Federal Works Administrator, thereunto duly authorized have signed this Declaration of Taking, as Federal Works Administrator this 14th day of November, 1944, in the City of Washington, District of Columbia.

UNITED STATES OF AMERICA

By PHILIP B. FLEMING
*Federal Works Administrator*

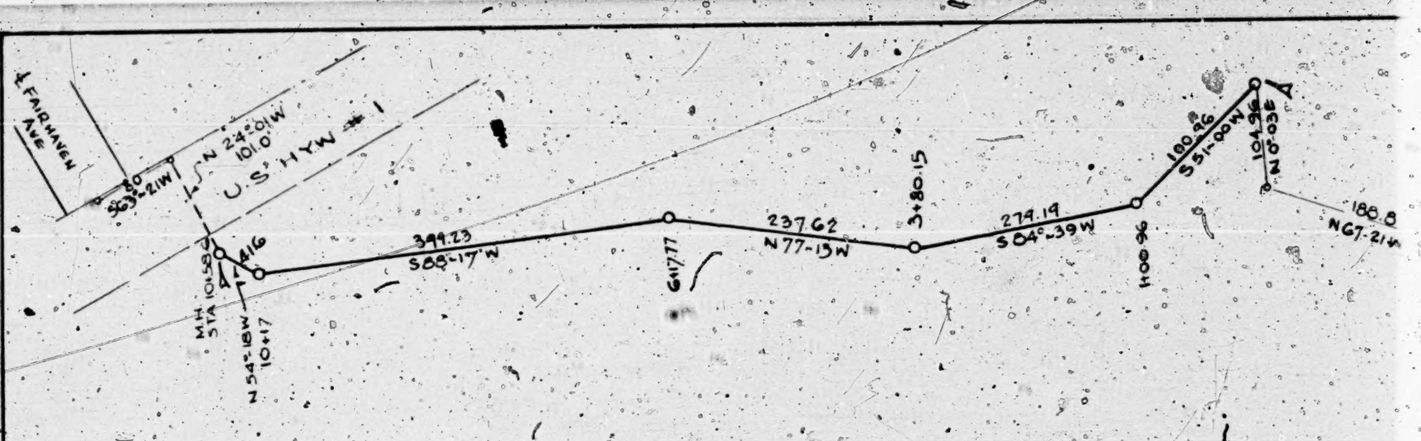
## SCHEDULE "A"

Perpetual easements in and to strips of land 10 feet in width lying and being in the County of Fairfax, Commonwealth of Virginia, to locate, construct, operate, maintain, repair, replace and remove sewer pipe lines and appurtenances, the center lines of said strips of land being particularly described as follows:

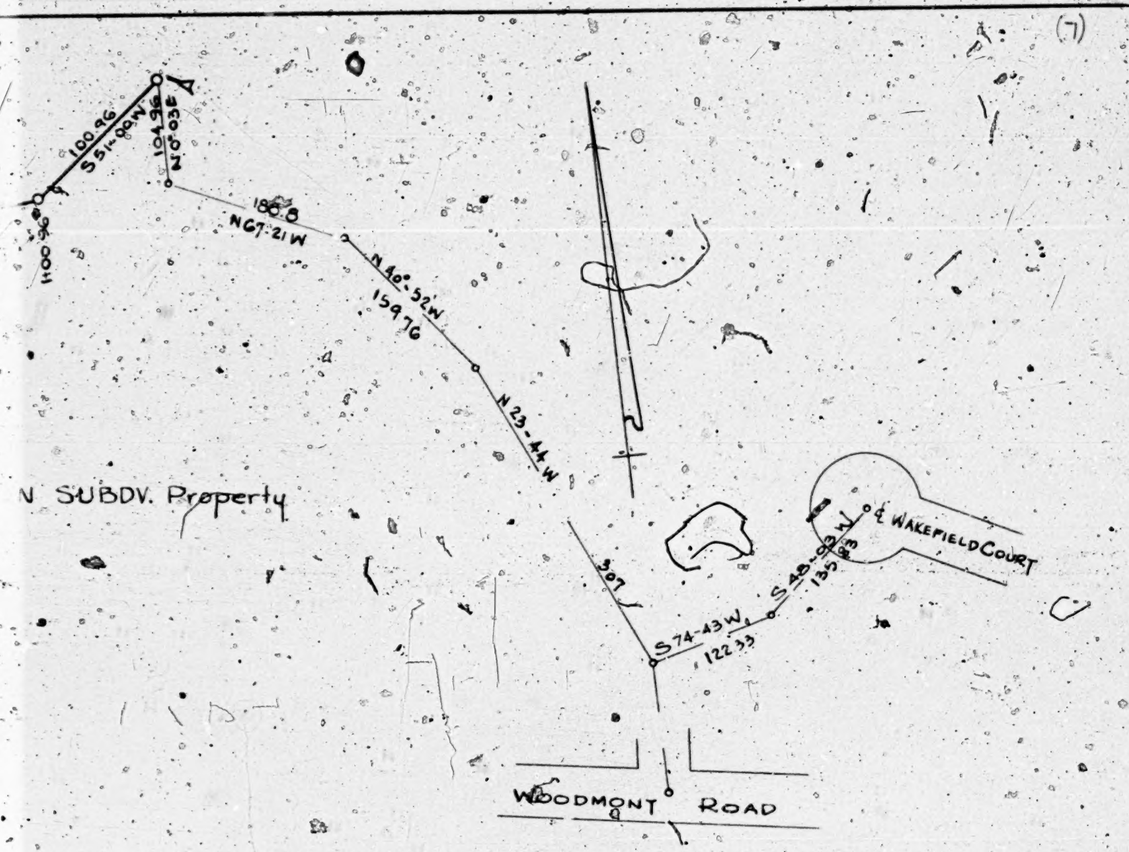
Purported Owner—Bell Haven Realty Corporation

. . . . . .

The total sum of money estimated by the acquiring authority to be just compensation for the aforesaid perpetual easements in this proceeding hereby taken is $2.00.




Contract 3-C (Station 0+0 – 10+58.8) is across BELLE HAVEN SUBDV. Property




N SUBDV. Property

RIGHT OF WAY MAP, CONTRACT 3C

THROUGH PROPERTY OF

**BELLE HAVEN, INC.**

FAIRFAX COUNTY, VA. OCT 1944

SCALE 1"=100'

Massey & Johnson

Fairfax, Va

CONTRACT 3C

TY OF

INC.

OCT 1944

on

Sta. 117+94.73

15TH STREET (UNDEVELOPED) (DEVELOPED)

N 13°-41' E 938.60 60

25

10' off ℄

BELLE HAVEN REALTY CORP ..... CORP .....

Sta. 108+56.13

43.13

N 40°-37' E

℄ STREET

℄ PLUS 108+13 BELLE HAVEN COUNTRY CLUB

Plat showing R.O.W. Taking Taking

STA 117+94.73 ~ STA. 108+13 108+13

THRU PROPERTY OF OF

BELLE HAVEN REALTY CORP Y CORP.

Fairfax County, Virginia, NOVEMBER, 1944 OVEMBER, 1944

SCALE 1" = 100'

MASSEY & JOHNSON

FAIRFAX, VIRGINIA

15A

45 (File endorsement omitted)

IN UNITED STATES DISTRICT COURT

(Title omitted)

**Amended Petition for Condemnation—Filed April 8, 1948**

To The Honorable Judge of Said Court:

Comes now the United States of America, the petitioner, upon leave of Court, and amends Paragraphs II and III of the original petition for condemnation, filed in this proceeding on December 13, 1944, to read as follows:

II.

That pursuant to this Act, the Honorable Philip B. Fleming, Administrator of the Federal Works Agency of the United States of America, has selected for acquisition by the United States of America perpetual easements in and to the property hereinafter described, to locate, construct, operate, maintain, repair, replace and remove sewer mains and their appurtenances in and to the street areas and privately owned lands, together with all right, title and interest in and to all sewer mains and their appurtenances presently constructed in the aforesaid street areas and privately owned lands, except sewer laterals constructed from improvements on lands abutting the aforesaid street areas and connected to said sewer mains, and has designated that the same are suitable and necessary for the purposes of the United States and that such selection and designation and determination have been and now are in full force and effect.

46 III.

That the perpetual easements in and to the following described street areas and privately owned lands are lying and being in Belle Haven Subdivision, Fairfax County, Virginia, and are more particularly described as follows:

. . . . . .

53 The other allegations contained in the original petition are prayed to be considered and made a part of this amended petition as though set out in full herein.

Your petitioner, therefore, prays that an order by this Court be made requiring all persons concerned to appear at the time

and place in such order to be named to make known their objections, if any they have, and their respective titles, claims, interests, or demands against said property, or improvements thereon, or any other matters material to their respective rights.

And your petitioner will ever pray.

UNITED STATES OF AMERICA

By GEORGE R. HUMRICKHOUSE
George R. Humrickhouse
*United States Attorney*

By A. CARTER WHITEHEAD
A. Carter Whitehead
*Special Assistant to the United States Attorney*

*Duly sworn to by A. Carter Whitehead, jurat omitted in printing.*

---

104 (File endorsement omitted)

IN UNITED STATES DISTRICT COURT

(Title omitted)

**Motion to Intervene as Defendants—Filed August 31, 1948**

The above-named applicants for intervention are owners in fee of property in the recorded subdivision of Belle Haven, Fairfax County, Virginia, and served by the sewer system title to which has been taken herein. They are also President, Vice-President and Secretary-Treasurer, respectively, of the Belle Haven Citizens' Association, Incorporated, which is a non-profit membership corporation organized and existing under the laws of the Commonwealth of Virginia, and the membership of which includes substantially all the property owners in the Belle Haven subdivision.

Applicants move for leave to intervene as defendants herein in order to request the limited relief set forth in their proposed answer, copy of which is attached hereto, on the ground that applicants, and the other members of the Belle Haven Citizens' Association, are so situated as to be adversely affected by the disposition
105 to be made of the property involved herein. The limited nature of the relief sought is such that the intervention will

not delay or prejudice the adjudication of the rights of the original parties.

J. BARTON PHILLIPS
J. Barton Phillips,
105 S. Royal Street,
Alexandria, Va.

FREDERICK A. BALLARD
Frederick A. Ballard,
912 American Security Bldg.,
Washington 5, D. C.
*Attorneys for Applicants for Intervention.*

---

Notice of Motion (omitted in printing)

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106 (File endorsement omitted)

IN UNITED STATES DISTRICT COURT

(Title omitted)

**Answer of Interveners—Filed August 31, 1948**

1. Interveners and the other members of the Belle Haven Citizens' Association (hereinafter collectively referred to as the "interveners") are the owners in fee of property served by the sewer system described in the Second Amended Declaration of Taking herein. Interveners are the owners, in equity, of undivided, pro-rata fee interests in such sewer system, and also own perpetual easements to use such system. The equitable ownership interests in interveners result from the fact that interveners and their predecessors in interest paid for installation of the system as part of the purchase price of the individual lots in the Belle Haven subdivision; which purchase price was paid to defendant Belle Haven Realty Corporation, which developed said subdivision and installed the sewer system, progressively beginning in 1925. The
107 easements of user of such system, running with the title to all abutting property, were acquired by interveners and their predecessors in interest by grant from defendant Belle Haven Realty Corporation as former owner and as developer of the Belle Haven subdivision.

2. The sewer system here involved was maintained and operated by defendant, Belle Haven Realty Corporation, without charge to

the property owners in the Belle Hayen subdivision, pursuant to contracts of purchase of the individual lots, until 1944. In 1944 the petitioner, without the consent of interveners, their predecessors in interest, or the property owners generally, and without any determination of this or any other court, blocked off the outlets of such system and connected it to the outlets of a trunk sewer system constructed by the petitioner, acting through the Federal Works Agency, and operated by the Board of Supervisors of Fairfax County, Virginia (hereinafter called the "Supervisors"), pursuant to lease from petitioner. Said lease contains the following provision as to user charges to be imposed upon the users of the leased system:

> "5. In consideration of the foregoing, the Lessee covenants and agrees that following delivery to it of possession of the Leased Property: • • •
>
> "(d) It will operate the Leased Property and the sanitary sewerage facilities connected therewith which are operated by the Lessee on a revenue-producing basis and will maintain and collect reasonable rates and charges for the services rendered by the Leased Property and the sanitary sewerage facilities connected thereto, which rates and charges shall be satisfactory to the Government and shall be commensurate with the services rendered or to be rendered."

In accordance with the above provision in the lease, the petitioner, acting through the Federal Works Agency, fixed a user charge of two dollars per month to be assessed upon all users of said system; and the Supervisors thereupon undertook to assess such charge upon interveners and the other property owners in Belle Haven subdivision. Such charge was substantially in excess of the reasonable cost of maintenance and operation of the Belle Haven system itself, and included a substantial amount for
108 amortization of the capital cost of the trunk system.

Upon information and belief petitioner and the Supervisors still intend to assess a charge containing such a capital element.

3. Interveners do not claim herein any reimbursement for their equitable ownership interests in the Belle Haven sewer system. They are also willing to pay to the Supervisors the actual cost of maintenance and operation of that system, and in fact desire that the Supervisors operate the system upon that basis. They seek herein only a perpetual guarantee that they and all other property owners in the Belle Haven subdivision shall not be required to pay anything in addition to such actual cost of maintenance and operation, and specifically that they be not required to pay any amount

applicable to amortization of the cost of their own system, or of the trunk system (to which the Belle Haven system was forcibly connected by petitioner without their consent).

WHEREFORE, interveners pray:

1. That their attached motion for leave to intervene be granted.

2. That the Court include in its judgment herein the stipulation that no present or future owner of property in the recorded subdivision of Belle Haven, Fairfax County, Virginia, shall at any time be assessed by petitioner or any successor in interest, as a user charge, tax, or in any other manner, any amount in excess of the actual cost of maintenance and operation of the sewer system within the said subdivision, and specifically shall never be in any manner assessed or charged with any amount applicable to amortization of or reimbursement for the capital cost of such system, or of any other system (including the trunk system to which the Belle Haven system has been connected).

109 3. For such other and further relief as to the Court may seem proper.

J. BARTON PHILLIPS
J. Barton Phillips,
105 S. Royal Street,
Alexandria, Va.

FREDERICK A. BALLARD
Frederick A, Ballard,
912 American Security Bldg.,
Washington 5, D. C.
*Attorneys for Applicants for Intervention.*

---

Certificate of Service (omitted in printing)

---

122 (File endorsement omitted)

IN UNITED STATES DISTRICT COURT

(Title omitted)

**Motion to Intervene as Defendant—Filed October 28, 1948**

The above-named applicant petitions this Honorable Court for leave to intervene as defendant in the above-named pending legal proceedings in order to request the relief prayed for in applicant's proposed answer, copy of which is attached, on the ground that

representation of the applicant's interest by existing parties to the proceeding is or may be inadequate and the applicant will be bound by a judgment in the action.

Applicant is the joint owner with his wife Treva G. Cunningham in fee of Lots 29 and 30, Block 1, Section 1 of the Subdivision of Belle Haven, Fairfax County, Virginia, and is served by the Belle Haven sewer system, a wholly self-contained and fully operating sewer system except as interferred with by Petitioner's unauthorized connections to its trunk-line system of the two outfalls of the Belle Haven system, title to which complete system of Belle Haven sewers Petitioner now seeks to acquire through condemnation proceedings instituted in the above entitled cause of action.

123 Applicant is privileged to direct the Court's attention to certain named other individual property owners in the Belle Haven subdivision served by said Belle Haven sewer system who by their signatures affixed hereto have indicated their concern in the matter pending before the Court and concur in this motion to intervene. The nature of the relief sought will not unduly delay or prejudice the adjudication of the original parties to the proceedings.

HARRY E. CUNNINGHAM
Harry E. Cunningham
12 Woodmont Road, Belle Haven
Alexandria, Virginia

---

Notice of Motion (omitted in printing)

---

124 (File endorsement omitted)

IN UNITED STATES DISTRICT COURT

(Title omitted)

**Amended Motion to Intervene as Defendant—Filed October 28, 1948**

The original motion to intervene filed by the above-named applicant in the above named proceedings is hereby amended for the purpose of presenting to the Court, as Exhibits A and B, copies of Deed of Bargain and Sale dated June 8, 1935, for Lot 29 from Leon J. and Thelma B. Peplinski to H. E. and Treva Graves Cunningham, and Deed of Bargain and Sale dated September 3, 1935, for Lot 30 from the Belle Haven Realty Corporation to H. E.

and Treva Graves Cunningham, referred to by recital in the aforementioned original motion.

In other respects the original motion as filed with the Court is unchanged.

HARRY E. CUNNINGHAM
Harry E. Cunningham
12 Woodmont Road, Belle Haven
Alexandria, Virginia

Copies sent by mail to United States Attorney and the Attorney for Belle Haven Realty Corporation, October 28, 1948.

HARRY E. CUNNINGHAM
Harry E. Cunningham

125

**Exhibit A**

THIS DEED, made this 8th day of June, 1935, between LEON J. PEPLINSKI and THELMA B. PEPLINSKI, his wife, parties of the first part and H. E. CUNNINGHAM and TREVA GRAVES CUNNINGHAM, his wife, as joint tenants with the full common law rights of survivorship, parties of the second part.

WITNESSETH, that in consideration of the sum of TEN DOLLARS and of other good, valuable and sufficient consideration in law, the receipt of which are hereby acknowledged, the said parties of the first part do hereby grant, bargain, sell and convey, with general warranty of title, unto the said parties of the second part, as joint tenants with the full common law rights of survivorship, all that certain lot or parcel of ground, together with all the improvements thereon and appurtenances to the same in any wise belonging, situated in Mount Vernon Magisterial District, Fairfax County, Virginia, and designated and know as follows, to wit:

> Lot numbered 29, in block numbered 1, section numbered 1, of the Subdivision of Belle Haven, as the same is duly dedicated, platted and recorded by deed recorded in Deed Book N #9, page 18, et seq., of the Fairfax County Land Records.
>
> It is the same property that was conveyed to the said Leon J. Peplinski by deed recorded in Deed Book V #9, page 291, of the Fairfax County Land Records.

THE SAID PARTIES OF THE FIRST PART covenant that they have the right to convey the said property to the said grantees; that they have done no act to encumber the said property; that they, the said parties of the second part, shall have quiet enjoyment of said property, free from the claims of all persons whomsoever; and that

they, the said parties of the first part will execute such further assurances of the said property as may be requisite.

Witness the following signatures and seals:

/s/ LEON J. PEPLINSKI (SEAL)

/s/ THELMA B. PEPLINSKI (SEAL)

126 STATE OF VIRGINIA }
CITY OF ALEXANDRIA }

I, Virginia R. Kane, a Notary Public for the City aforesaid, in the State of Virginia, do certify that Leon J. Peplinski and Thelma B Peplinski, his wife, whose names are signed to the writing hereto annexed, bearing date on the 8th day of June, 1935, have acknowledged the same before me in my City aforesaid.

GIVEN UNDER MY HAND, this 11th day of June, 1935.
My commission expires on the 31st day of August 1937.
I was commissioned as Virginia Reveley

/s/ VIRGINIA R. KANE
*Notary Public*

I hereby certify that this is a true copy of the original.
H. E. CUNNINGHAM

127 **Exhibit B**

THIS DEED, made this 3rd day of September, 1935, between the BELLE HAVEN REALTY CORPORATION, a corporation chartered, organized and existing under the laws of the State of Virginia, party of the first part and H. E. CUNNINGHAM and TREYA GRAVES CUNNINGHAM, his wife, as joint tenants with the full common law rights of survivorship, parties of the second part.

WITNESSETH, that in consideration of the sum of TEN DOLLARS and of other good, valuable and sufficient consideration in law, the receipt of which are hereby acknowledged, the said party of the first part doth hereby grant, bargain, sell and convey, with general warranty of title, unto the said parties of the second part, as joint tenants with the full common law rights of survivorship, all that certain lot or parcel of ground, together with any improvements thereon and appurtenances to the same in any wise belonging, situated in Mount Vernon Magisterial District, Fairfax County, Virginia, and designated and know as follows, to wit:

Lot numbered 30, in Block number 1, Section numbered 1, of the Subdivision of Belle Haven, as the same is duly dedicated, platted and recorded by deed recorded in Deed Book N #9, page 18 et seq., of the Fairfax County Land Records.

A right of way 5 feet wide over and along the rear and side lines of the above described property is hereby reserved for the construction, maintenance and repair of poles and wires and the transmission of Electric and Telephone service, water, sewer, drainage and other pipes and conduits.

It is part of the same property that was conveyed to the said party of the first part by deed recorded in Deed Book K #9, page 587 of the Fairfax County Land Records.

SUBJECT, however, to certain conditions and restrictions set forth in the deed of Dedication in Deed Book N #9, page 18 et seq., of the Fairfax County Land Records, which conditions and restrictions shall operate as covenants running with the title.

The said party of the first part covenants that it has the right to convey the said property to the said grantees; that it has done no act to encumber the said property; that they, the said parties of the second part, shall have quiet enjoyment of said property, free from the claims of all persons whomsoever; and that it, the said party of the first part, will execute such further assurances of said property as may be requisite.

128 IN WITNESS WHEREOF, the said BELLE HAVEN REALTY CORPORATION has caused these presents to be signed by its president and its seal to be hereto affixed, attested by the Secretary on the day and year first hereinbefore written.

BELLE HAVEN REALTY CORPORATION
By: /s/ CLARENCE J. ROBINSON
*President*

ATTEST:

/s/ JULIAN T. BURKE
*Secretary*

STATE OF VIRGINIA
CITY OF ALEXANDRIA } to-wit:

I, James R. Caton, Jr., a Commissioner in Chancery in and for the Circuit Court of the City of Alexandria, State of Virginia, do hereby certify that Clarence J. Robinson, the President and Julian T. Burke, the Secretary of the BELLE HAVEN REALTY CORPORATION, whose names are signed to the writing foregoing and hereto annexed, bearing date on the 3rd day of September, 1935, personally appeared before me in my City aforesaid and acknowledged the said writing to be the act and deed of the said corporation and the seal thereto affixed to be its corporate seal and that said deed was so

signed and acknowledged by them and the said seal so affixed by authority of the Board of Directors of the Corporation.

GIVEN under my hand this 23rd day of October, 1935

/s/ JAMES R. CATON, JR.
*Commissioner in Chancery.*

I hereby certify that this is a true copy of the original.

H. E. CUNNINGHAM

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134 (File endorsement omitted)

IN UNITED STATES DISTRICT COURT

(Title omitted)

**Memorandum of Opinion—Filed November 4, 1948**

Since hearing argument on the motions for intervention filed by certain property owners in the Belle Haven Subdivision, I have given the questions presented considerable thought and study. It is my conclusion that the individuals who purchased lots from the Belle Haven Corporation in its subdivision acquired easements in and to the sewer system, although no specific mention of any such easement was mentioned in either the deeds of conveyance or the contract of purchase.

In my opinion, these easements might properly be termed "easements by implication" or "by implied grant", although possibly they might come within the category of "easements by
135 estoppel" or "easements of necessity".

In discussing "easements by implied grant", Mr. Minor states (I Minor on Real Property 124) that the foundation principle upon which rests the creation of easements by implied grant, is that a grant of land carries with it by implication as incident thereto everything reasonably necessary to the enjoyment of the thing granted which it is in the power of the grantor to bestow. On this subject, Mr. Minor continues as follows:

"Sec. 104. Same-B. *Quasi Easements Converted into Easements.*

"We have seen that while no one can have a real easement in *his own land*, he may be accustomed to utilize part of his land for the benefit of another part, thereby creating a relation between the two parts, which may be termed a *quasi* easement, which, however, constitutes no real interest separate and apart

from his *general ownership* of both tracts, and his consequent right to use either as he sees fit.

"But upon the same principle adverted to as the foundation of easements by *implied grant* generally, namely, that where one grants land he is presumed to pass all in his power to confer that is *reasonably necessary* to the enjoyment of the land granted, if the owner of the two tracts should convey the *quasi dominant* tenement, retaining the *quasi servient* tract, the grant of the former carries with it by *implication* the right to the continued use of the servient tract, as it had been previously used. But this is subject to the qualification, at least where the *servient* estate subsequently or simultaneously comes into possession of some one *other than the original owner*, that the *quasi* easement is (1) apparent, (2) continuous, and (3) *reasonably necessary* to the enjoyment of the dominant tract.

"Thus, in Sanderlin v. Baxter, two estates, 'Woodlawn' and 'Fairfield', separated only by a public road, were both owned by W., who drained Woodlawn by ditches through Fairfield to the river. In 1811, W. granted Woodlawn to A. (under whom the plaintiff claimed) and in 1820 he devised Fairfield to D. (under whom the defendant claimed). The deed and will were both silent about the drainage; but at the time Woodlawn was conveyed these draining ditches were *open* and *visible*, operating regularly and *continuously*, and were then, as they continued to be, *necessary* for the *convenient* and *beneficial* use and enjoyment of Woodlawn, for which purpose they were continuously used down to 1878, when they were *obstructed* by Sanderlin, the then owner of Fairfield. Thereupon, Baxter, the owner of Woodlawn, enjoined Sanderlin from obstructing the ditches, and the injunction was made perpetual.

136 "On the other hand, in Scott v. Beutel, a like relief was denied because the easement claimed was not *obvious and apparent*, nor known to the purchaser to exist at the time of the purchase.

"In Paine v. Chandler, pipes for the *supply of water* were laid through one tract to another, both tracts at the time belonging to the same owner, but the ownership later became separated; and it was held that the easement, being apparent, continuous and necessary, passed with the transfer of the dominant tract."

It also seems to me that Section 5168 of the present Code of Virginia, which was Section 2443 of the Code of 1887, has some significance. This section is as follows:

> "*Appurtenances, etc., included in deed of land.*
> Every deed conveying land shall, unless an exception be made therein, be construed to include all buildings, privileges and appurtenances of every kind belonging to the lands therein embraced."

I have also considered the rather full discussion of "Creation of Easements by Implication" in *Restatement of the Law—Property—Division V—Servitudes,* beginning at page 475, and it seems to me that the principles there enunciated support the conclusion which I have reached here.

The case of *Oney* v. *West Buena Vista Land Company, etc.* 104 Va. 580, seems to me to be quite analogous to the situation presented here. In that case, the facts were that during the boom period of the 90's, defendant land company subdivided a tract of land west of Buena Vista, showing on its plat a bridge to be constructed across the river connecting the prospective development with the Town of Buena Vista. This plat was recorded and the bridge was actually built. While the bridge was being built, plaintiff bought land in the deveopment at a price about twice as much as the property was worth in the absence of a bridge. Although the deed to the plaintiff referred to the plat and the plat showed the bridge, no reference to the bridge was made in
137 the deed to the plaintiff, and of course no easement was specifically granted him. However, the court held that "the law implies a grant of the bridge as an easement to the property conveyed."

In the light of the above and other authorities, I am of the opinion that the Belle Haven property owners acquired easements in the sewer system as it existed at the time of their purchases. Inasmuch as the Government's taking has deprived them of their easements, I am of the opinion that they are entitled to intervene and assert their claims for just compensation. I am not at this time passing on any questions of how just compensation should be arrived at, or whether or not intervenors have any rights to impose any limitation on the Government's taking in lieu of just compensation.

A. W. BARKSDALE
*United States District Judge.*

138 (File endorsement omitted)

IN UNITED STATES DISTRICT COURT

(Title omitted)

**Order Granting Leave to Intervene—Filed November 4, 1948**

Upon the motion filed August 31, 1948, and supplemental motion filed November 1, 1948, of W. Ralph Davis, Frank A. Leamy and Margaret M. Boothe, individually, and as officers of Belle Haven Citizens Association, a corporation, for leave to intervene in this action, and upon the motion and amended motion tendered on October 28, 1948, of Harry E. Cunningham, for leave to intervene in this action, and the answers of the said petitioners proferred with their said motions, argument in support of and in opposition to said motions having been heard by the court on October 28, 1948, upon consideration whereof, the court being of the opinion, for

139 reasons set out in a Memorandum filed herewith, that, taking the factual allegations of the said motions and proferred answers as true, petitioners had property rights by way of easements appurtenant in and to the Belle Haven sewer system which is the subject matter of this action, and therefore have a right to intervene and assert their claims for just compensation, it is so adjudged. It is therefore

ORDERED

that the motions of the above-named parties for leave to intervene be, and they are, hereby granted; and it is further

ORDERED

that the answers proferred by the said parties be, and they are, hereby filed, without prejudice, however, to the right of the United States of America or any other party hereto to move to strike out said answers, or any part thereof, should the United States of America or any other party hereto be so advised: to which action of the court in granting the said motions for intervention, the United States of America, by counsel, objected and excepted for reasons fully stated to the court.

And it is further

ORDERED

that the Clerk mail certified copies of this order, and uncertified copies of the court's Memorandum, to A. Carter Whitehead, Esq., Special Assistant to the United States Attorney, Richmond, Va., J. Randall Caton, Jr., Esq., Attorney at Law, Alexandria, Va.,

J. Barton Phillips, Esq., Attorney at Law, 108 N. St. Asaph St., Alexandria, Va., Frederick A. Ballard, Esq., Attorney at Law, 912 American Security Bldg., Washington-5, D. C., and Mr. Harry E. Cunningham, 12 Woodmont Road, Belle Haven, Alexandria, Va.

Enter:

A. W. BARKSDALE
*United States District Judge.*

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171 (File endorsement omitted)

IN UNITED STATES DISTRICT COURT

(Title omitted)

**Motion for Temporary Injunction—Filed February 11, 1950**

W. Ralph Davis, Frank A. Leamy, and Margaret M. Boothe, interveners herein, move the Court for an order enjoining petitioner from collecting or asserting the right to collect, by sending bills or otherwise, charges for the use of the sewer system in Belle Haven subdivision, either directly or through any agent or lessee (including the Board of Supervisors of the County of Fairfax, Virginia, as lessee), pending determination by this Court of the just compensation to which the property owners in Belle Haven are entitled herein; and directing the recall of bills sent on or about January 1, 1950. The grounds for this motion are:

1. The Belle Haven sewer system, which has been taken by petitioner, has since March 4, 1949, been operated under a lease from petitioner by "The Board of Supervisors of Fairfax County, Virginia, acting for and in Behalf of Sanitary District No.
172 1, Fairfax County, Virginia" (hereinafter referred to as "Fairfax County"). On or about January 1, 1950, bills for the use of the sewer system (for the first quarter of 1950) were sent by Fairfax County to the property owners in Belle Haven. The charge contained in the bills is $2.00 per month, which is the same amount charged generally to users of the trunk sewer system to which the Belle Haven system was connected. This charge is alleged in the uncontroverted answer (par. 2) filed herein by these interveners to be "substantially in excess of the reasonable cost of maintenance and operation of the Belle Haven system itself, and included a substantial amount for amortization of the captial cost of the trunk system". As also alleged in the answer filed by these interveners (par. 2), the Belle Haven system was connected to the trunk system, prior to the taking herein, "without the consent of interveners, their predecessors in interest, or the property owners generally, and without any determination of this or any other court * * *".

As further alleged in said answer (par 2) petitioner under its lease to Fairfax County controls the amount of the charge to be made.

2. On November 4, 1948, this Court granted the motion of these interveners to intervene as defendants herein, and held that they and the property owners whom they represent had easements in the Belle Haven sewer system which were taken by petitioner.

3. The answer filed herein by these interveners waives monetary damages for their easements and claims as the just compensation to which they are entitled a reasonable limitation upon the amount which they can be charged by petitioner (and those claiming under it) for the use of their own system. Specifically, their answer
173 asks that they be protected against forcibly contributing toward the amortization of the capital cost of the trunk system to which the Belle Haven system was connected by petitioner but from which Belle Haven users derive no benefit. Accordingly, the question of "just compensation" for the taking of the Belle Haven system, which is now pending before this Court, directly involves the *amount* which can lawfully be charged in the future for the use of the system. Nevertheless, petitioner and its lessee, Fairfax County, have now attempted to decide for themselves, without awaiting the decision of this Court, the amount of the charge to be made.

4. Interveners and those whom they represent will be irreparably damaged if the current bills are not recalled, and future bills enjoined (pending decision herein) since the bills represent a cloud upon the title to the properties involved, chapter 161 of the Acts of Assembly of 1926, as amended by the Act of March 4, 1948 (Acts of Assembly of 1948, chap. 94), section 3(e); and there is no provision of law requiring refund of overpaid charges of this category.

ANDREW A. CLARKE
108 N. Fairfax Street,
Alexandria, Virginia

JOSEPH W. WYATT
Joseph W. Wyatt,
Tower Building,
Washington, D. C.

FREDERICK A. BALLARD
Frederick A. Ballard,
American Security Building,
Washington, D. C.
*Attorneys for Interveners.*

174 Notice of Motion (omitted in printing)

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Certificate of Service (omitted in printing)

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184 (File endorsement omitted)

IN UNITED STATES DISTRICT COURT

(Title omitted)

**Government's Motion to Strike etc.—Filed March 22, 1950**

Comes now the United States of America by its attorney, and moves the court to strike from the answers of the intervenors filed in this proceeding such portions thereof as deal with the Government's use of the property taken in this proceeding, and particularly the second prayer of the intervenors' petition.

A. CARTER WHITEHEAD
*Special Assistant to the*
*United States Attorney.*

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185 (File endorsement omitted)

IN UNITED STATES DISTRICT COURT

(Title omitted)

**Memorandum of Opinion—Filed March 29, 1950**

STATEMENT OF THE CASE.

Some years ago, probably beginning as early as 1925, Belle Haven Realty Corporation began the development of a residential subdivision in Fairfax County near the City of Alexandria. In the development, streets and lots were laid off, and a complete and adequate sewer system was installed. From time to time, lots were sold to individuals who built residences. The cost of the installation of the sewer system was prorated, and a proportionate part of such cost was included in the price paid by the purchasers of the lots. In their conveyances of lots to purchasers, Belle Haven Realty Corporation did not specifically mention the sewer
186 system, but did include in the conveyances a grant of "all appurtenances to the same and in any wise belonging",

As houses were built, they were connected to the sewer system, and no charge for the use of the system was made against the property owners.

In this proceeding, instituted on December 13, 1944, the United States of America, on behalf of the Federal Works Agency, has condemned and taken the entire Belle Haven sewer system, and has connected it, at least in part, to a trunk line sewer which replaces at least one of the original out-falls. This taking was without objection, and without claim for compensation on the part of Belle Haven Realty Corporation. Apparently, it was the thought of both the Belle Haven Realty Corporation and the Government that the individual property owners had no rights or interest in the sewer system. Subsequent to the taking of the sewer system, it has been leased to, and operated by, the Board of Supervisors of Fairfax County, Virginia, acting for and in behalf of Sanitary District No. 1, Fairfax County, Virginia. Beginning January 1, 1950, the Board of Supervisors of Fairfax County began sending monthly bills to the Belle Haven householders in the amount of $2.00 each as a sewer service charge, which amount, according to the allegations of certain Belle Haven householders, covers not only the cost of maintenance and operation of the Belle Haven sewer system, but also includes an amount for the amortization of the costs of installation of the trunk line sewer to which the Government has connected the Belle Haven system.

In the Fall of 1948, certain of the Belle Haven property owners filed petitions to intervene herein, alleging that the Belle Haven property owners owned the Belle Haven sewer system, or at least had rights therein which had been taken by the Government without payment of compensation therefor. In their answers which they sought to file, petitioning property owners waived all claims to monetary compensation on condition that, in lieu of monetary compensation, the court include in the judgment of taking a stipulation or limitation that no present or future Belle Haven
187 property owner be assessed by the Government, or any successors in interest, as a user charge, tax, or in any other manner, any amount in excess of the actual costs of maintenance and operation of the sewer system within the said subdivision, and specifically, that such property owners never be in any manner assessed or charged with any amount for amortization of the trunk line sewer to which the Belle Haven system has been connected. As to these petitions, the Government took the position that the property owners had no rights or interests in the sewer system, and objected to intervention by the petitioning property holders. After a hearing, I reached the conclusion, as set out in a memorandum filed herein on November 4, 1948, that the property owners did have "property rights by way of easements appurte-

nant in and to the Belle Haven sewer system", and therefore had the right to intervene and assert their rights to just compensation by reason of the taking of such rights by petitioner. I did not at that time pass on the question of whether or not the court might grant intervenors' petition for a limitation on the charges which might be assessed against them in lieu of monetary compensation. No further action was taken herein until February 11, 1950, when certain intervenors filed their motion for a temporary injunction, asking the court to enjoin petitioner and its agents and lessees from collecting, or asserting the right to collect, any charges for the use of the Belle Haven sewer system until the court had determined the question of just compensation raised by their answers. A hearing was held on intervenors' motion for a preliminary injunction at Alexandria on March 22, 1950, during the course of which hearing, petitioner, by counsel, filed its motion to strike out of intervenors' answer their claim for a limitation of user charge as just compensation in lieu of monetary damages. Time was allowed intervenors within which to file a memorandum in opposition to the Government's motion, and such memorandum has now been filed and considered. Intervenors' motion for a pre-
188 liminary injunction was taken under advisement pending a decision on the Government's motion.

## Discussion of the Question Involved.

In this proceeding, without objection, the Government has already taken the entire Belle Haven sewer system. The Government now vigorously opposes the imposition of any limitation upon its use of the sewer system, or the imposition of any limitation upon it or its lessee of the charges which may be made for the use of the sewer system. Inasmuch as it is obvious from what has taken place that the Government took this sewer system for the purpose of maintaining it and integrating it with more comprehensive sewer facilities, it does not seem to me inappropriate, from a common sense viewpoint, that the Belle Haven property owners be compensated for the taking of their easements of user by the grant of a continued right of user, the charge for such user being limited to the costs of maintenance of the Belle Haven sewer system. However, here, the Government has taken the entire sewer system in fee, opposes any diminution of its taking, and asserts that nothing less than the fee would be sufficient for its purposes. Under these circumstances, I have reached the conclusion that the court has no power to reduce, by limitation or otherwise, the estate and title taken by the Government.

As was said in *Shoemaker* v. *United States*, 147 U. S. 282, 298:

> "The adjudicated cases likewise establish the proposition that while the courts have power to determine whether the use for which private property is authorized by the legislature to be taken, is in fact a public use; yet, if this question is decided in the affirmative, the judicial function is exhausted; that the extent to which such property shall be taken for such use rests wholly in the legislative discretion, subject only to the restraint that just compensation must be paid."

189 See also *United States* v. *Gettysburg &c. Co.*, 160 U. S. 668, 685. In other words, it seems to me to be the law that it is beyond the judicial function to determine that a fee simple, subject to an easement, is sufficient for the Government's purposes, when the Government, in carrying out legislative purposes, asserts that nothing less than the fee simple would be adequate.

See *Roanoke City* v. *Burkowitz*, 80 Va. 616, 623:

> "The view thus expressed is fully supported by the adjudged cases, which hold that the question as to the degree or quantity of interest to be taken is, like other political questions, exclusively for the legislature; and that when the use is public, the necessity or expediency of appropriating any particular property is not a subject of judicial cognizance. *De Varaigne* v. *Fox*, 2 Blatchf. 95; *People* v. *Smith*, 21 N. Y. 595; *Boom Company* v. *Patterson*, 98 U. S. 403; *United States* v. *Jones*, 109 Id. 513; *Beekman* v. *S. S. R. R. Co.*, 3 Paige 45; S. C., 22 Am. Dec. 679, and cases cited in the note, p. 692."

It is well settled that just compensation means the equivalent in money of the property taken. See *United States* v. *Miller*, 317 U. S. 369, wherein it is said (p. 373):

> "The Fifth Amendment to the Constitution provides that private property shall not be taken for public use without just compensation. Such compensation means the full and perfect equivalent in money of the property taken. The owner is to be put in as good position pecuniarily as he would have occupied if his property had not been taken."

It is true that there are instances to be found in the reported cases, where property owners have been compensated in media other than money. *Jefferson County* v. *Tennessee Valley Authority*, 146 F. (2d) 564. See also *Kansas City* v. *Napiecek*, 76 Kan. 693, 92 Pac. 827; *Morris* v. *The Boston & Maine Railroad*, 2

Cush. (Mass.) 536, 2 Lewis on Eminent Domain (3rd ed.), paragraph 756 (paragraph 505 of 2nd edition), p. 1343. However, it appears that in all these instances, which I have been able to find, where compensation other than money was awarded, it was by consent of the parties.

In the paragraph in Lewis on Eminent Domain cited above, it is said:

> "The commissioners or other tribunal to assess damages have no authority to give compensation in anything but money. It is erroneous, therefore, for them in their award
> 190 to reserve to the owner certain easements or privileges in the property condemned, such as the right to construct a way over it or drains through it, or the right to leave buildings or parts of buildings standing thereon and use them as before. So it is erroneous for the tribunal to award that the party condemning shall do certain things for the benefit of the owner, and to reduce the damages accordingly."

At the very end of the paragraph, it is pointed out that, although an owner is not bound to accept licenses and privileges to go upon and use the property taken, parties, by consent, may ratify such provisions in such a way as to make binding contracts between them, capable of being enforced in the usual way. But it is also pointed out that where the statute vests a fee in the party condemning, and the award reserves an easement to the owner, such an award would be void as repugnant to the legal effect of the condemnation.

It is therefore my conclusion that this court has no power, in awarding just compensation to the intervening Belle Haven property holders, to reduce the fee simple taken by the Government by imposing easements thereon or limitations on the use of the property taken by the Government.

An order will therefore be entered granting the Government's motion to strike, and allowing intervenors thirty days within which to amend their answers, should they be so advised. Intervenors' motion for a preliminary injunction will be denied.

A. W. BARKSDALE
A. W. Barksdale
*United States District Judge.*

(File endorsement omitted)

191 IN UNITED STATES DISTRICT COURT

March 30, 1950.

(Title omitted)

**Order—Filed March 29, 1950**

Upon the motion of W. Ralph Davis, Frank A. Leamy and Margaret M. Boothe, intervenors herein, for a temporary injunction, filed herein on February 11, 1950, this action came on to be heard and was argued by counsel at Alexandria on March 22, 1950, and during the course of said argument, petitioner, the United States of America, by counsel, indicating its desire to file its motion to strike certain matter from intervenors' answers, leave to file such motion was granted, and the United States of America, by counsel, filed in writing herein its motion to strike from the answers of the intervenors filed in this proceeding such portions thereof as deal with the Government's use of the property
192 taken in this proceeding, and particularly the second prayer of the intervenors' answers, and the court not being fully advised of its judgment, and counsel for intervenors desiring time within which to file a memorandum in opposition to petitioner's said motion, the court took time to consider and allowed intervenors' counsel five days within which to file their memorandum.

Counsel for intervenors having now filed their memorandum in opposition to petitioner's motion to strike, and the court, having maturely considered the issues presented, being of the opinion, for reasons set out in a memorandum filed herewith, that petitioner's motion to strike is well grounded, it is so adjudged. It is therefore

ORDERED

that petitioner's motion, filed herein on March 22, 1950, to strike from the answers of the intervenors filed in this proceeding such portions thereof as deal with the Government's use of the property taken in this proceeding, and particularly the second prayer thereof, be, and the same is, hereby granted, and the matters referred to in said petition be, and they are, hereby stricken from intervenors' answers.

And it further appearing to the court that the grounds of intervenors' motion for a preliminary injunction are not well taken, inasmuch as the court has heretofore herein stricken from the intervenors' answers their prayer for limitation of user charges to be required of them for the use of the sewer system heretofore taken by petitioner herein, it is therefore

ORDERED

that the intervenors' motion for a temporary injunction be, and the same is, hereby denied.

And it is further

ORDERED

that intervenors be, and they hereby are, allowed thirty days
193 from this date within which to amend their answers should they be so advised.

And it is further

ORDERED

that the Clerk certify and mail copies of this order, together with uncertified copies of the Court's Memorandum of Opinion this day filed, to A. Carter Whitehead, Esq., Special Assistant to the United States Attorney, Richmond, Virginia, Frederick A. Ballard, Esq., American Security Building, Washington, D. C., Andrew W. Clarke, Esq., 100 N. Fairfax Street, Alexandria, Va., J. Randall Caton, Esq., Attorney at Law, Alexandria, Virginia, and Mr. Harry E. Cunningham, 12 Woodmont Road, Belle Haven, Alexandria, Virginia.

Enter:

A. W. BARKSDALE
*United States District Judge.*

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(File endorsement omitted)

199 IN UNITED STATES DISTRICT COURT

(Title omitted)

**Amended Answer of Intervening Defendants—Filed April 28, 1950**

1. The intervening defendants are owners in fee of property served by the Belle Haven sewer system described in the Second Amended Declaration of Taking. This answer is filed in behalf of all such property owners except any who have filed or may file separate answers. The property owners in whose behalf this answer is filed (including the named intervening defendants) are hereinafter collectively referred to as the "defendants".

2. Defendants are the owners in equity of undivided, pro-rata fee interests in the Belle Haven sewer system, and also own appurtenant easements to use such system. The equitable owner-

ship interests in defendants result from grant and release by the former owner of the sewer system, defendant Belle Haven Realty Corporation, and from the fact that defendants and their predecessors in interest paid for the installation of the system as part of the purchase price of the individual lots in the Belle
200 Haven subdivision. This purchase price was paid to defendant Belle Haven Realty Corporation, which developed said subdivision and installed the sewer system, progressively, beginning in 1925. The easements of user of such system, running with the title to all abutting property, were acquired by defendants and their predecessors in interest by grant from defendant Belle Haven Realty Corporation as former owner and developer of the Belle Haven subdivision.

3. The sewer system here involved was maintained and operated by defendant, Belle Haven Realty Corporation, without charge to the property owners in the Belle Haven subdivision, pursuant to contracts of purchase of the individual lots, until 1944. During 1944 (the exact date not being known to defendants) petitioner, without the consent of defendants or their predecessors in interest, and without any determination of this or any other court, blocked off the outlets of such system and connected it to a trunk sewer system constructed by petitioner, acting through the Federal Works Agency, and operated by the Board of Supervisors of Fairfax County, Virginia (hereinafter called "Fairfax County") pursuant to lease from petitioner. On March 4, 1949, the Belle Haven system was covered under such lease and has since that date been operated thereunder.

4. Petitioner has contracted to sell to Fairfax County the trunk system, together with the Belle Haven system, and payments on the agreed purchase price are currently being made. The purpose of petitioner in condemning the Belle Haven system was and is to transfer such system to Fairfax County. The Belle Haven system was, prior to 1944, entirely separate and independent of the trunk system, and unrelated thereto. It was in no way necessary for the construction or operation of the trunk system to con-
201 nect it to the Belle Haven system. No public use of petitioner was or will be served by the taking of the Belle Haven system.

5. The taking of the Belle Haven sewer system was not authorized by any statute of the United States. Specifically it was not authorized under any of the acts relied upon by petitioner in its Second Amended Declaration of Taking, including the Lanham Act (Act of October 14, 1940, as amended, U.S.C. sec. 1531-1564), for the reasons, among others, that that act does not authorize the

taking over as a going concern, of properties, real and personal, of a privately owned public utility; that the President has made no finding, as required by section 202 of the Lanham Act, with respect to an "acute shortage" in Belle Haven "of public works * * * necessary to the health, safety, or welfare of persons engaged in national defense activities * * *"; and that the President has not approved, as further required by said section, the taking of the Belle Haven system as a method of relieving "such shortage" of public works, if any existed in Belle Haven.

6. The Belle Haven sewer system, prior to the interference with it by petitioner in 1944, was a completely integrated system, with its own independent outlets into the Potomac River. Defendants derive no benefit whatsoever from the trunk system to which the Belle Haven system was forcibly connected by petitioner.

WHEREFORE, defendants pray:

1. That petitioner be ordered to restore forthwith the Belle Haven sewer system to its condition prior to its alteration and connection to petitioner's trunk system during 1944, and thereupon to return the Belle Haven system to the possession of defendants;

202 2. That if the taking be approved by this court, defendants and all property owners on whose behalf this amended answer is filed be severally awarded just compensation for the taking of the Belle Haven sewer system.

3. For such other and further relief as to the court may seem proper.

J. BARTON PHILLIPS, F.A.B.,
J. Barton Phillips,
108 N. St. Asaph Street,
Alexandria, Va.
JOSEPH W. WYATT, F.A.B.,
Joseph W. Wyatt,
Tower Building,
Washington, D. C.
FREDERICK A. BALLARD,
American Security Building,
Washington, D. C.
*Attorneys for Intervening Defendants.*

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Certificate of Service (Omitted in printing)

(File endorsement omitted)

203 IN UNITED STATES DISTRICT COURT

(Title omitted)

**Answer of Belle Haven Realty Corporation—Filed December 15, 1950**

For answer to the proceedings herein, the Belle Haven Realty Corporation states as follows:

1. That it is a corporation organized and existing under the laws of the State of Virginia; that it has its principal office at No. 111 South Fairfax Street in the City of Alexandria in said State; that it developed the recorded subdivision of Belle Haven, a subdivision situated in the County of Fairfax immediately to the south of Hunting Creek, bounded on the east by Fort Hunt Road and on the west by the Richmond Washington Highway, known as U. S. No. 1; that it installed the sewer system located therein progressively, beginning in the year 1925.

2. The cost of installing said system was added by the said defendant proratably to the purchase price of the individual lots which were sold to the present owners in Belle Haven or their predecessors in title.

3. Subject to whatever equitable interest which may be adjudged to be in the respective property owners in the Belle Haven subdivision, this defendant is the legal owner, in fee simple, of
204 the sewer system serving the said subdivision of Belle Haven, together with the easements and rights over which various portions of the sewer system are installed, as described in the second amended Declaration of Taking herein.

4. This defendant claims as just compensation for the taking herein the present reproduction cost of such system, less depreciation, however, as of the date of the taking herein, or April 8, 1948, together with interest as provided by law.

5. For further answer, this said defendant, by way of review, states that in the spring of 1943, a Mr. Massey, Engineer of the government project, requested that the defendant corporation permit a sewer line from the subdivision of Fair Haven, a government financed project, and from the Anti-Aircraft Battery at Mt. Eagle, to be connected with our trunk line sewer extending along the Richmond Highway, thus saving the government the cost of building a line from these two projects along the western side of said highway to connect with the trunk line sewer then being constructed by the government under his supervision; that upon this

defendant's refusal to accede to this request, this defendant was advised by attorneys representing the Department of Justice and F. W. A. that it was the purpose of the government to condemn not only this outlet line, but an easement over property extending from the Belle Haven Country Club to the Belle Haven Road; that out of these discussions there arose an agreement that this defendant would accept nominal damages of $1.00 provided that the entire system in Belle Haven be taken, including all laterals, and that in the final order it be provided that there be no maintenance, operation, construction, re-construction, replacements, or assessment charges against any lot, lots or parts of lots within the recorded subdiviison of Belle Haven made and recorded prior to January 1, 1943; that there be no maintenance, operation, construction, reconstruction, replacements, or assessment charges against any lots to be created abutting or being sewered into those sewers now built and existing in easements, dedicated streets, or proposed streets either in Belle Haven or New Alexandria as shown on plat prepared by Massey and Johnson January 16, 1943.

This defendant further states that throughout these proceedings, it has had as its foremost consideration the rights and wel-
205 fare of the property owners in the subdivision of Belle Haven and was the sole factor in this defendant's agreement to accept nominal damages, and this defendant does not now believe that its understandings and proposed stipulations have been complied with.

BELLE HAVEN REALTY CORPORATION
By: J. RANDALL CATON, JR.,
111 S. Fairfax St.,
Alexandria, Va.

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Certificate of Service (Omitted in printing)

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215 IN UNITED STATES DISTRICT COURT

(Title omitted)

**Affidavit of Edward S. Holland, C.E.—Filed December 19, 1950**

STATE OF VIRGINIA }
CITY OF ALEXANDRIA } ss:

I, Edward S. Holland, being first duly sworn, on oath state:

I am a civil engineer and surveyor with my office at 316 S. Washington Street, Alexandria, Va. I received my C. E. degree

at the University of Maryland in 1933. In 1936, I was certified by the State of Virginia as a land surveyor. In 1947, I was licensed in Virginia as a professional engineer, civil engineer branch. I have designed and supervised the construction of several sanitary sewer systems, including additions to the system serving the subdivision of Belle Haven. I have also designed simple sewage disposal plants.

I am familiar with the design and construction of the Belle Haven sewer system and its outfalls. The system is largely on a hill, and was, prior to about 1944, a self-sufficient, integrated system. Its sewage flowed by gravity through two outfalls, the western one outletting into Hunting Creek (a tributary of the Potomac River), and the eastern one into the Potomac directly. About 1944 the Federal Works Agency (F.W.A.) constructed a trunk sewer system (known as the Holmes Run Trunk 216 Sewer) serving other sections of Fairfax County, and outletting into the Potomac just east of Belle Haven. A lateral line was run by F.W.A. from Fair Haven (a subdivision to the west of Belle Haven) into the trunk line; and this lateral was cut into the west outfall line of the Belle Haven system running along Route No. 1 (Richmond Road). The Fair Haven sewage flowed thence into the trunk line north of Belle Haven. F.W.A. then blocked off the original outfalls of the Belle Haven system, outletting its sewage through the main outlet of the trunk system. This was all done about 1944.

The trunk system is thus a gravity system running past the foot of Belle Haven hill. The only benefit from an engineering standpoint received by the trunk system from the Belle Haven system was the convenience of flowing the Fair Haven sewage through portions of the Belle Haven west outfall. The taking of the main Belle Haven system in 1948 contributed nothing whatever from an engineering standpoint to the trunk system, and was totally unnecessary for the construction or operation of the trunk system. The Belle Haven system gained no benefit whatever from being connected to the trunk system.

EDWARD S. HOLLAND
Edward S. Holland

Subscribed and sworn to before me this 19th day of December, 1950.

(SEAL)

LILLIAN S. ELLMORE
*Notary Public*
My commission expires July 21, 1953

217 IN UNITED STATES DISTRICT COURT

THE WHITE HOUSE
WASHINGTON
Mar. 11, 1942

My dear General Fleming:

Pursuant to Title II of the Act of October 14, 1940 (Public No. 849, 76th Congress), as amended, I hereby find that an acute shortage of public works or equipment for public works, as indicated opposite the name of the place listed below, necessary to the health, safety, or welfare of persons engaged in national defense activities, exists or impends, which would impede national defense activities, in the area or locality in and about the following place:

| Place | Public Works or Equipment Required | Total Estimated Cost |
|---|---|---|
| Various, in Fairfax County, Virginia | Sewer Facilities | $936,000 |

I further find that such public works or equipment cannot otherwise be provided when needed, or could not be provided without the imposition of an increased excessive tax burden or an unusual or excessive increase in the debt limit of the taxing or borrowing authority in which such shortage exists.

I hereby approve your taking action by any of the methods prescribed by said Act to relieve such shortage.

Very sincerely yours,

/s/ FRANKLIN D. ROOSEVELT

Brigadier General Philip B. Fleming
Federal Works Administrator
Washington, D. C.

(File endorsement omitted)

254 IN UNITED STATES DISTRICT COURT

December 3, 1951.

(Title omitted)

**Memorandum of Opinion—Filed December 3, 1951**

On December 13, 1944, the United States of America filed its petition for condemnation in this action. Upon this petition, an

amended petition and declarations of taking, an order was entered herein on April 8, 1948, vesting title in petitioner, and awarding possession to petitioner, of all the real estate and easements comprising the entire Belle Haven sewer system. At that time, only Belle Haven Realty Corporation was a party respondent. Pursuant to a previous understanding Belle Haven Realty Corporation interposed no objection to the Government's taking, and the Government deposited only nominal damages as estimated just compensation.

Beginning about 1925, Belle Haven Realty Corporation began the development of a residential subdivision in Fairfax County, Virginia, near the City of Alexandria. In the development, streets and lots were laid off and a complete and adequate sewer system was installed. From time to time, lots were sold to individuals, who built residences. The cost of the installation of the sewer system was prorated, and a proportionate part of such cost was included in the price paid by the purchasers of the lots. In
255 their conveyances of lots to purchasers, Belle Haven Realty Corporation did not specifically mention the sewer system, but did include in the conveyances a grant of "all appurtenances to the same and in any wise belonging." As houses were built, they were connected to the sewer system and no charge for the use of the system was made against the property owners. After the entry of this country into World War II in December 1941, the demand for housing accommodations in the vicinity of Washington became very acute. Acting under the authority of the statute known as the Lanham Act, as amended, 54 Stat. 1125, 55 Stat. 361, Government agencies undertook to increase the facilities for housing defense workers in the City of Alexandria, Arlington and Fairfax Counties, amongst other nearby territories. Of course, sewerage was necessary for the defense housing, and the Government prepared a very comprehensive plan for the disposal of sewerage in Fairfax County. In the spring of 1943 a Government engineer requested the Belle Haven Realty Corporation for permission to use some of its sewer facilities. At that time, of course, the Belle Haven subdivision had a completely integrated sewer system with outfalls into the Potomac River. Belle Haven refused this request, whereupon, after negotiations, to quote from Belle Haven's answer, "there arose an agreement that this defendant (Belle Haven Realty Corporation) would accept nominal damages of a dollar provided that the entire system in Belle Haven be taken, including all laterals, and that in the final order it be provided that there be no maintenance, operation, construction, reconstruction, replacements, or easement charges, against any lot, lots, or parts of lots, within the recorded subdivision of Belle Haven, made and recorded prior to January 1, 1943; that there be no main-

tenance, operation, construction, reconstruction, replacements, or easement charges against any lots to be created abutting those sewers now built and existing in easements, dedicated streets, or proposed streets, . . . ."

It seems never to have occurred to either the Government or to Belle Haven Realty Corporation that the individual lot owners had any interest or ownership in the sewer system. Accordingly, this action was instituted naming only Belle Haven Realty Cor-
256 poration as respondent. The Government proceeded to take the Belle Haven sewer system, to connect it with certain trunk sewers, and generally to integrate it with its comprehensive sewer system. Thereafter, the Government leased the sewer system to Fairfax County, Virginia, acting for and on behalf of Sanitary District No. 1 of Fairfax County. Sometime prior to August 31, 1948, Fairfax County began sending monthly bills to Belle Haven householders in the amount of $2.00 each, as a sewer service charge, which amount, according to the Belle Haven householders, was sufficient to cover not only the costs of maintenance and operation of the Belle Haven sewer system, but also included an amount for the amortization of the costs of installation of the trunk line sewer to which the Government connected the Belle Haven system.

Certain lot owners, together with Belle Haven Citizens Association, Inc., felt themselves aggrieved and filed their motion to intervene herein and protect their rights. The Government opposed such intervention, but I, for reasons set out in an opinion therewith filed, reached the conclusion that the householders had acquired equitable interests in the sewer system, and entered an order allowing the individual lot owners to intervene and seek just compensation for their interests in real estate taken by the Government. This opinion is reported as *United States* v. *Certain Parcels of Land in Fairfax County, Virginia, et al.* (*Davis, Intervenor, et al.*), 89 F. Supp. 567.

In their answers, intervenors waived any claim to monetary reimbursement provided the court include in its judgment of taking a stipulation that neither they, nor other lot owners similarly situated, be required to pay any service charge greater than enough to defray the costs of maintenance and operation of their sewer system: that is, that they be protected from being required to pay any part of the amortization of the cost of the trunk line or other part of the sewer system. The Government's motion to strike out this prayer raised the question of whether or not this court could, over its protest, impose such a limitation on the Government's taking.

Inasmuch as the Belle Haven householders had a sewer system ample for their needs, which they had paid for as part of the purchase prices of their lots, the contention of the intervenors

257 did not seem to me unreasonable. However, I came to the conclusion that, without its consent, under the law I was powerless to impose any such limitation or condition on the Government's taking. This opinion is reported as *United States* v. *Certain Parcels of Land in Fairfax County, Virginia, et al.* (*Davis, Intervenor, et al.*), 89 F. Supp. 571.

The intervenors, being allowed to amend their answers, have filed answers as mentioned at the outset hereof, directly attacking the authority of the Government to acquire their sewer system by condemnation and praying that the Government be required to restore their sewer system to the condition in which it was before the Government's taking.

Intervenors rely heavily on *Puerto Rico Light & Power Co.* v. *United States* (1st Circ.), 131 F. (2d) 491. It is true that under the Lanham Act, the District Court in this case allowed the Government to condemn an entire electric power and tramway system and integrate it with the Government's water power project, and the Circuit Court reversed on the ground that the condemnation was not authorized by the Lanham Act. I have reached the conclusion that the Government's taking here was unauthorized, but I do not find it necessary to rely on the *Puerto Rico* case, *supra*.

Subsequent to the *Puerto Rico* case, and, it would seem, to some extent on account of it (Congressional Record, July 6, 1943, pp. 7286, 7287), the Lanham Act was amended. 57 Stat. 565. At the time of the institution of this action, the Lanham Act contained the following proviso:

> "Provided *further*, That (a) none of the funds authorized herein shall be used to acquire public works already operated by public or private agencies, except where funds are allotted for substantial additions or improvements to such public works, and with the consent of the owners thereof, . . ."

When this proviso came to my attention in the consideration of the briefs which had been filed, I wrote to Government counsel (with copies to other counsel) as follows:

258 "While I have come to no final conclusion, and will not before hearing from you, it appears to me that the Belle Haven sewer system was undoubtedly 'public works already operated by' a private agency. If that be true, even though it be conceded for the sake of argument, that funds were allotted for substantial additions or improvements, was the taking with 'the consent of the owners thereof?' I should think that the consent referred to would mean an unconditional consent, and intervenors contend that the consent of Belle Haven Realty Corporation was only a conditional con-

sent. However, even if it be conceded that the necessary consent was obtained from Belle Haven Realty Corporation, was that sufficient? The Government's brief and amendatory paragraph refer to Belle Haven Realty Corporation as the '*purported owner*'. There is no such language as that in the statute. The statute says '*consent of the owners.*' Assuming the correctness of my previous holding that the property owners who had purchased from Belle Haven Corporation owned easements in and to the sewer system, were they not also owners *pro tanto* of the sewer system? If the property owners were in fact part owners of the sewer system, no consent having been obtained from them, how can the Government's taking be justified?''

Thereupon, Government counsel requested leave to file a supplemental brief, which leave was granted, and at the request of all parties, the whole matter was deferred for a number of months while interested parties sought an amicable solution of the matter. Failing to reach an amicable solution, supplemental briefs have been filed by both sides, and upon consideration thereof, I am still of the opinion rather plainly indicated by my letter to Government counsel.

On the question of whether or not the individual Belle Haven property owners acquired interests in the sewer system when they purchased their lots, the Government's supplemental brief cites certain Virginia decisions which seem to me to support the conclusion which I had previously reached herein (89 F. Supp. 567). The cases cited in the Government's supplemental brief are *City of Danville* v. *Forest Hills Development Corp.*, 165 Va. 425, 182 S. E. 548; *City of Richmond* v. *Henrico County*, 185 Va. 176, 37 S. E. (2d) 873; *Payne* v. *Godwin*, 147 Va. 1019, 133 S. E. 481, and *Lindsay* v. *James*, 188 Va. 646, 51 S. E. (2d) 326.

Inasmuch as the proviso quoted above was a part of the Lanham Act at the time this action was instituted, the conclusion seems to me inescapable that the sewer system here sought to be acquired by the Government could only be acquired, ''with the consent of the owners thereof.'' I do not believe that the qualified consent of the Belle Haven Realty Corporation was sufficient to
259 comply with the statute, but even if I should be wrong as to this, the Government does not even contend that it secured the consent of the individual lot owners, and I do not feel any doubt that they were included amongst the ''owners'' of the property sought to be acquired.

It therefore follows that an order will be entered, setting aside the orders heretofore entered herein vesting title in, and awarding possession to the Government, and dismissing this action. I am of

the opinion that this court has no power in this action to require the Government to restore the Belle Haven sewer system to its condition prior to the Government's taking. If the owners of the Belle Haven sewer system have suffered compensable damage by reason of the Government's taking, they must seek their relief in an appropriate action.

A. W. BARKSDALE
*United States District Judge Designate.*

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(File endorsement omitted)

260 IN UNITED STATES DISTRICT COURT

December 3, 1951.

(Title omitted)

**Order Dismissing Petition—Filed December 1, 1951**

Upon the amended answer of intervening defendants, W. Ralph Davis, Frank A. Leamy, Margaret M. Boothe, for etc., filed herein on April 28, 1950, containing allegations which render said amended answer, in effect, a motion to dismiss, and which, without objection, has been by all parties considered as a motion to dismiss; oral argument, written briefs and supplemental briefs on behalf of the petitioner and said intervening defendants having been maturely considered by the court, the court being of the opinion, for reasons stated in a Memorandum of Opinion herewith filed, that the condemnation of land and easements thereto appertaining, sought herein by petitioner, is not authorized by the statute relied upon by petitioner for its authority
261 to condemn the real estate and easements thereunto pertaining, it is so adjudged. It is therefore

ORDERED

that the order entered herein on April 8, 1948, vesting title in petitioner, and awarding to petitioner possession of the real estate and easements thereunto pertaining, described in petitioner's petition and amended petition and in said order, the order entered herein on February 24, 1949, vesting title in petitioner to certain property, together with any other orders which may have been entered herein vesting title in petitioner, and awarding to petitioner possession of said real estate, be, and the same are, hereby set aside and held for nought.

And it is further

ORDERED

that this action be, and the same is, hereby dismissed and stricken from the docket at the costs of the petitioner: to all of which action by the court, petitioner, by counsel, objected and excepted for reasons fully stated to the court.

It is further

ORDERED

that the Clerk certify and mail copies hereof, together with copies of the Court's Memorandum of Opinion, to Frederick A. Ballard, Esquire, American Security Building, Washington 5, D. C.; J. Randall Caton, Jr., Esquire, 111 South Fairfax Street, Alexandria, Virginia, and A. Carter Whitehead, Esquire, United States Attorney, Richmond, Virginia.

Enter:

A. W. BARKSDALE
*United States District Judge, Designate.*

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271 IN UNITED STATES COURT OF APPEALS

**Argument and Submission**

April 7, 1952, (April term, 1952) cause came on to be heard before PARKER, Chief Judge, and SOPER and DOBIE, Circuit Judges, and was argued by counsel and submitted.

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272 IN UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 6399

UNITED STATES OF AMERICA, *Appellant*,

v.

CERTAIN PARCELS OF LAND IN THE COUNTY OF FAIRFAX, COMMONWEALTH OF VIRGINIA, and BELLE HAVEN REALTY CORPORATION, ET AL.; and W. RALPH DAVIS, FRANK A. LEAMY, MARGARET M. BOOTHE, Individually and as Officers of BELLE HAVENS' CITIZENS' ASSOCIATION, a Corporation, Interveners, *Appellees*.

*Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria.*

**Opinion—Filed May 10, 1952**

(Argued April 7, 1952. Decided May 10, 1952.)

Before PARKER, Chief Judge, and SOPER and DOBIE, Circuit Judges.

Edmund B. Clark, Attorney, Department of Justice, (Wm. Amory Underhill, Assistant Attorney General; A. Carter Whitehead, United States Attorney, and John F. Cotter, Attorney, De-
273 partment of Justice, on brief) for Appellant; and Frederick A. Ballard (J. Randall Caton and Joseph W. Wyatt on brief) for Appellees.

PARKER, Chief Judge:

This an appeal in a suit brought to condemn a sewer system which had been constructed by the Belle Haven Realty Corporation of Fairfax County, Virginia, and which served persons who had purchased building lots from that corporation. The suit was instituted in 1944 "to acquire an easement for the construction and operation of sewer pipes in land occupied by sewer pipes" of the corporation. By amendments to the petition and declaration

of taking, filed in April 1948, the scope of the taking was enlarged to acquire easements in the lateral sewer lines and also title to all sewer mains previously constructed by the corporation in the area. At the time of the first declaration of taking, just compensation estimated at $2 was deposited, at the time of the second declartion of taking, the amount deposited as just compensation was $1. The condemnation proceedings purported to be instituted under authority of the Lanham Act of October 14, 1940, 54 Stat. 1125, as amended June 28, 1941, 55 Stat. 231, and July 15, 1943, 57 Stat. 565, 42 U.S.C. sec. 1531 et seq.

In August 1948, owners of property served by the sewer system filed petitions asking that they be allowed to intervene in the proceeding alleging that they were owners of an interest in the sewer system sought to be condemned; that they had paid for the system by paying their share of the construction cost in the purchase of their lots; that they had acquired rights and easements with respect to the system which entitled them to use it free of charge;
that the United States had connected the system with a sys-
274 tem which it had constructed and had leased the consolidated system to Fairfax County; and that Fairfax County in defiance of their right to use the system free of charge had assessed against each of them a monthly charge of $2. They asked that they be allowed to intervene and assert their rights in the premises and an order was entered allowing intervention, the court holding that the Belle Haven property owners had acquired easements in the sewer system as it existed at the time of their purchases. See *United States* v. *Certain Parcels of Land, etc.*, 80 F. Supp. 571.

In the answer which they sought to file, the intervening property owners stated that they waived claims to monetary compensation for the taking of their easements in the sewer system on condition that, in lieu of monetary compensation, the court include in the judgment of taking a provision that they be not assessed anything in excess of the cost of maintenance of the sewer system taken and specifically that they be not charged with any amount for amortization of the trunk line system with which the system taken had been connected. Upon motion of the United States, this portion of the answer was stricken by the District Judge on the ground that, in awarding compensation to the property owners, the court was without power "to reduce the fee simple taken by the government by imposing easements thereon or limitations on the use of the property taken". *United States* v. *Certain Parcels of Land, etc.*, 89 F. Supp. 567.

Following the order striking this portion of the answer of the intervenors, the Belle Haven Realty Corporation, which had not answered up to that time, filed an answer in which it stated that

the cost of the sewer system had been added to the purchase price of the Belle Haven Realty Development, that it was the owner of the sewer system subject to the equities of the property
275 owners and was entitled to reproduction cost less depreciation as compensation for the taking. By way of further answer it stated that its agreement to accept nominal damages was conditioned upon its being provided in the final order that there be "no maintenance, operation, construction, reconstruction, replacement, or assessment charges" against any lot in the Belle Haven subdivision which had been sold prior to that time. The intervenors filed amended answers challenging the right of the government to maintain the suit under the Lanham Act. In the light of these answers and the facts developed at a number of pretrial hearings, the court entered an order dismissing the suit, on the ground that the consent of the owners of the sewer system had not been obtained as required by the provisions of the Lanham Act. See *United States* v. *Certain Parcels of Land, etc.*, 101 F. Supp. 172. The facts were thus stated by the court below in the opinion then filed:

> "Beginning about 1925, Belle Haven Realty Corporation began the development of a residential subdivision in Fairfax County, Virginia, near the City of Alexandria. In the development, streets and lots were laid off and a complete and adequate sewer system was installed. From time to time, lots were sold to individuals, who built residences. The cost of the installation of the sewer system was prorated, and a proportionate part of such cost was included in the price paid by the purchasers of the lots. In their conveyances of lots to purchasers, Belle Haven Realty Corporation did not specifically mention the sewer system, but did include in the conveyances a grant of 'all appurtenances to the same and in any wise belonging.' As houses were built, they were connected to the sewer system and no charge for the use of the system was made against the property owners.
>
> After the entry of this country into World War II in De-
> 276 cember 1941, the demand for housing accommodations in the vicinity of Washington became very acute. Acting under the authority of the statute known as the Lanham Act, as amended, 54 Stat. 1125, 55 Stat. 361, Government agencies undertook to increase the facilities for housing defense workers in the City of Alexandria, Arlington and Fairfax Counties, amongst other nearby territories. Of course, sewerage was necessary for the defense housing, and the Government prepared a very comprehensive plan for the disposal of sewerage in Fairfax County. In the Spring of 1943, a Govern-

ment engineer requested the Belle Haven Realty Corporation for permission to use some of its sewer facilities. At that time, of course, the Belle Haven subdivision had a completely integrated sewer system with outfalls into the Potomac River. Belle Haven refused this request, whereupon, after negotiations, to quote from Belle Haven's answer, 'there arose an agreement that this defendant (Belle Haven Realty Corporation) would accept nominal damages of a dollar provided that the entire system in Belle Haven be taken, including all laterals, and that in the final order it be provided that there be no maintenance, operation, construction, reconstruction, replacements, or easement charges, against any lot, lots, or parts of lots, within the recorded subdivision of Belle Haven, made and recorded prior to January 1, 1943; that there be no maintenance, operation, construction, reconstruction, replacements, or easement charges, against any lots to be created abutting those sewers now built and existing in easements, dedicated streets, or proposed streets, * * *."

We think it clear that this suit for the condemnation of an existing sewer system cannot be maintained under the Lanham Act. The provision of the statute relied on (Act of Oct. 14, 1940, Title II (Lanham Act), sec. 202, as added June 28, 1941, 55 Stat. 362, 42 U.S.C. sec. 1532) is as follows:

277 "Whenever the President finds that in any area or locality an acute shortage of public works or equipment for public works necessary to the health, safety, or welfare of persons engaged in national-defense activities exists or impends which would impede national-defense activities, and that such public works or equipment cannot otherwise be provided when needed, or could not be provided without the imposition of an increased excessive tax burden of an unusual or excessive increase in the debt limit of the taxing or borrowing authority in which such shortage exists, the (Federal Works Administrator) is authorized, with the approval of the President, in order to relieve such shortage—(a) To acquire, prior to the approval of title by the Attorney General if necessary * * * improved or unimproved lands or interests in lands by purchase, donation, exchange, lease * * * or condemnation (including proceedings under sections 257, 258, 361-368 and 258a-258e of Title 40, for such public works."

Other sections of the statute make provision for the construction of public works, utilization of existing works, grants in aid etc.; but none of the others grants any power to exercise the right of eminent domain.

A sewer system is a system of drainage pipes, not lands or interests in lands. Easements in land are essential to the maintenance of such system; but the power to condemn easements in order that a system may be constructed does not carry with it the power to condemn an existing system. *Puerto Rico Ry. Light & Power Co.* v. *United States*, 1 Cir. 131 F. 2d 491, 499. Counsel for the government assert the contrary, but they cite no authority to sustain their position, and we know of none. The rule is well settled that a general power of condemnation does not authorize the condemnation of property already legally appropriated to a public or quasi public use, in the absence of legislative au-
278 thority expressly given or necessarily implied. 18 Am. Jur. 723-724; 29 C.J.S. 866; 10 R.C.L. 198-199; note 173 A.L.R. 1379; *Alexandria & F. R. Co.* v. *Alexandria & W.R. Co.*, 75 Va. 780, 40 Am. Rep. 743; *Vermont Hydro-Electric Corp.* v. *Dunn*, 95 Vt. 144, 112 A. 223, 12 A.L.R. 1495; *Old Colony R. Co.* v. *Framingham Water Co.*, 153 Mass. 561, 27 N.E. 662; 13 L.R.A. 332. A fortiori a general power to condemn lands may not be construed to authorize the condemnation of a public works system merely because easements in land are appurtenant thereto. This would seem to be elementary.

That it was not the intention of Congress to authorize the acquisition of existing public works systems under the Lanham Act was not only decided, and we think correctly so, in *Puerto Rico Ry. Light & Power Co.* v. *United States, supra*, but was also expressed subsequent to that decision by Congress itself in the act of 1943 increasing the appropriation for the acquisition of property under the Lanham Act. The act increasing the appropriation contained the following proviso: "* * * Provided further, That (a) none of the funds authorized herein shall be used to acquire public works already operated by public or private agencies, except where funds are allotted for substantial additions or improvements to such public works and with the consent of the owners thereof * * *". Act of July 15, 1943, 57 Stat. 565, as amended July 3, 1945, 59 Stat. 383, 42 U.S.C.A. sec. 1534.

The purpose of this proviso was thus stated by Senator Taft, upon whose motion it was written into the appropriation bill:

> "Mr. President, the first clause of the Amendment provides 'that none of the funds authorized herein shall be used to acquire public works already operated by public or private agencies.'
>
> 279 "When the subcommittee of the Committee on Territorial and Insular Affairs were in Puerto Rico we found that the F.W.A. took 10 million of this rather limited fund intended for the construction of works in connection with the housing

in industrial areas and used it to acquire all the power companies of Puerto Rico, the San Juan Power Company and the Mayaquez Power Company. So far as I can see there was no real justification for that. As a matter of fact, the Federal Circuit Court in Boston subsequently held that there was an illegal application of those funds.

"I do not mean to say that it might not be desirable for the insular government, which owned a good many of the power facilities, the dams and the like, to take over the private power companies and consolidate them all into one system, but certainly there was nothing in the Lanham Act which authorized any such proceeding. It was intended to provide new facilities, it was not intended to provide for taking over old facilities. I think it is perfectly clear that no such power should be included in the Act." Cong. Rec. July 6, 1943, p. 7286.

On the following day Senator Taft consented to the modification of the proviso so as to permit the acquisition of an existing utility with the consent of the owner, saying:

"Mr. President, yesterday I offered an amendment which was agreed to. The Public Works Agency objects to the limitation which provides 'that none of the funds authorized herein shall be used to acquire public utilites already operated by public or private agencies.'

"When the amendment was offered, I referred to the Puerto Rican case. The Public Works Agency cites a case of a railway connection with a naval plant in one of the western states where they must have the railroad in order to complete the whole railway project which the Navy desires.
280 The railroad is worth, let us say, $1,000,000, and they are to put in $2,000,000 in order to complete the project. They have asked that in a case of that kind they be authorized to take over the existing work, where they are enlarging it. Even in such cases I do not think the authority should be given except with the consent of those who own the existing public works. Therefore I agree to an amendment so that the amendment would read: (Final form)." Cong. Rec., July 7, 1943, p. 7314.)

This shows beyond peradventure that it was the intention of Congress that public works should not be acquired under the Lanham Act without the consent of the owners; and the case was dismissed by the judge below on the ground that no such consent had been obtained. We think that this was correct, whether the ownership of the system be regarded as being in the Realty Cor-

poration or in the lot owners who had paid for it and whose rights and easements constituted the only real value that it had. The lot owners could not be deprived of these rights and easements without just compensation;* and it is reasonable to interpret the consent required by the statute as applying to them as well as to the Realty Corporation which had built the system but whose interest therein no longer had any appreciable value. If, however, we look to the Realty Corporation alone, the consent necessary to acquisition by the government is not shown, since its consent was given upon a condition which the government is unwilling to accept. The government contends that this appears merely from the answer of the corporation and has not been established by evidence. The judge found it as a fact, however, after hearing the parties in a number of pre-trial conferences. Furthermore, the government has not pleaded compliance with the condition which it
281 should have done, as it was expressly made a condition precedent to the right to acquire the property. See 18 Am. Jur. 961-962. Of course, if the owners of the property consented to its acquisition, there would be no necessity for condemnation or for the maintenance of this proceeding to condemn. The Realty Corporation does not consent except upon a condition that the government is unwilling to accept. So far as the lot owners are concerned, they not only have not consented but the government has not so much as asked that their interests be condemned.

We need not give consideration to this proviso, however, nor to failure to plead compliance with the conditions which it imposes. It is perfectly clear, as pointed out above, that the power of condemnation given by the Lanham Act extends only to lands or interests in lands; and, even though the condition be ignored, there is nothing in the act which authorizes the condemnation of a public works system such as this. So far as the situation here is concerned, the proviso merely emphasizes a lack of power to condemn which seems perfectly obvious without it.

For the reasons stated, we think that the condemnation suit was properly dismissed; and we cannot see that any undesirable results are likely to follow from the dismissal. The Belle Haven system is being utilized in the public works program as a result of the connection of the system with the system constructed by the government, and this will not be affected by the dismissal. All that remains are questions arising out of rights in the Belle Haven system, which can be adjudicated in proceedings properly brought for that purpose. We find nothing in the Lanham Act, however, which would justify the settlement of these questions here. Certainly there is nothing in that act which authorizes the government
282 to take from abutting owners without compensation and

* See opinion below 89 F. Supp. 571, and 18 Am. Jur. pp. 787-788.

without their consent their rights in an existing public works system.

The case before us comes to this. Owners of property in a suburban subdivision are served by a sewer system which was constructed for their use and was ultimately paid for by them. For the benefit of the government, and not for their benefit, this system has been connected with another system built by the government and the integrated system has been leased to Fairfax County. In order that the county may assess the same charges against those entitled to the use of the Belle Haven system that it assesses against others who have no such rights, the government attempts to acquire the Belle Haven system by paying $3 to the company which constructed it and ignoring the rights of those who are as truly the real owners of that system as if it had been built by them as a cooperative enterprise. There is nothing in the Lanham Act which authorizes this to be done.

*Affirmed.*

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284 IN UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 6399

UNITED STATES OF AMERICA, *Appellant*,

v.

CERTAIN PARCELS OF LAND IN THE COUNTY OF FAIRFAX, COMMONWEALTH OF VIRGINIA, and BELLE HAVEN REALTY CORPORATION, ET AL.; and W. RALPH DAVIS, FRANK A. LEAMY, MARGARET M. BOOTHE, Individually and as Officers of BELLE HAVEN CITIZENS' ASSOCIATION, a Corporation, Interveners, *Appellees*.

**Judgment—Filed and Entered May 10, 1952**

APPEAL FROM the United States District Court for the Eastern District of Virginia.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

JOHN J. PARKER
*Chief Judge, Fourth Circuit.*
MORRIS A. SOPER
*U. S. Circuit Judge.*
ARMISTEAD M. DOBIE
*U. S. Circuit Judge.*

288 (Clerk's Certificate to foregoing transcript omitted in printing.)

(File endorsement omitted)

289 IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1952

(Title omitted)

**Stipulation as to Record—Filed November 6, 1952**

It is hereby stipulated and agreed by and between counsel for the respective parties to the above-entitled cause that, for the purpose of hearing and determining the case on the merits, the printed record shall consist of the following:

1. Petition in Condemnation filed December 13, 1944, omitting plat.
2. Declaration of Taking filed December 13, 1944, omitting description of land in Schedule A.
3. Amended petition filed April 8, 1948, omitting description and plat.
4. Application for leave to intervene with proposed answer, filed August 31, 1948.
5. Motion to intervene of Harry E. Cunningham, filed October 28, 1948, and amended motion and exhibit.
6. Memorandum of opinion filed November 4, 1948.
7. Order granting leave to intervene filed November 4, 1948.
8. Intervenors' motion for temporary injunction filed February 11, 1950.
9. Government's motion to strike filed March 21, 1950.
10. Order filed March 29, 1950.
11. Memorandum of opinion filed March 30, 1950.
12. Amended answer of intervening defendants filed April 25 (28?), 1950.

290 13. Answer of Belle Haven Realty Corporation filed December 14, 1950.

14. Affidavit of Edward S. Holland filed December 19, 1950.

15. Letter of authorization (dated March 11, 1942) filed December 19, 1950.

16. Memorandum of opinion filed December 3, 1951.

17. Order of dismissal filed December 3, 1951.

18. Proceedings in the United States Court of Appeals for the Fourth Circuit.

19. Argument of Cause.

20. Opinion of Court of Appeals filed May 10, 1952.

21. Judgment entered and filed May 10, 1952.

22. Clerk's certificate.

23. Order granting writ of certiorari.

24. This stipulation.

It is further stipulated and agreed that counsel may refer in their briefs and argument to the record on file in this Court, including any part thereof which has not been printed.

ROBERT L. STERN
Robert L. Stern
*Acting Solicitor General*
*Counsel for Petitioner*
FREDERICK A. BALLARD
*Counsel for Respondents*

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293 SUPREME COURT OF THE UNITED STATES

No. 253, October Term, 1952.

(Title omitted)

**Order Allowing Certiorari—Filed October 13, 1952**

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit is granted. The case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆U.S. GOVERNMENT PRINTING OFFICE 1952—231409/P.O. 700

# PETITION FOR WRIT of CERTIO-RARI

FILED
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CHARLES ELMORE CROPLEY
CLERK

No. 253

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SUPREME COURT, U.S.

# In the Supreme Court of the United States

OCTOBER TERM 1952

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UNITED STATES OF AMERICA

v.

CERTAIN PARCELS OF LAND IN THE COUNTY OF FAIRFAX, COMMONWEALTH OF VIRGINIA, AND BELLE HAVEN REALTY CORPORATION, ET AL.

---

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT**

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# In the Supreme Court of the United States

OCTOBER TERM 1952

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No.

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UNITED STATES OF AMERICA

v.

CERTAIN PARCELS OF LAND IN THE COUNTY OF FAIRFAX, COMMONWEALTH OF VIRGINIA, AND BELLE HAVEN REALTY CORPORATION, ET AL.

---

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment entered on May 10, 1952, by the United States Court of Appeals for the Fourth Circuit.

### OPINIONS BELOW

The opinion of the Court of Appeals (R. 33-43) is reported at 196 F. 2d 657. The opinions of the District Court are reported at 89 F. Supp. 567 and 571 and at 101 F. Supp. 172.

## JURISDICTION

The judgment of the Court of Appeals was entered May 10, 1952 (R. 45). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether an Act of Congress authorizing the Federal Works Administrator, with the approval of the President, to acquire "improved or unimproved lands or interests in lands" authorizes the condemnation of easements in lands which contain sewer pipes being used for sewage disposal and deemed to be "already legally appropriated, to a public or quasi-public use."[1]

## STATUTES INVOLVED

So far as material Section 202 of the Act of June 28, 1941, 55 Stat. 361, 362, 42 U.S.C. 1532 provides:

> SEC. 202. Whenever the President finds that in any area or locality an acute shortage of public works or equipment for public works necessary to the health, safety, or welfare of persons engaged in national-defense activities exists or impends which would impede national-defense activities, and that such public works or equipment cannot otherwise be

[1] In the event this petition is granted, the Government will also argue that it complied with the conditions upon acquisition imposed by the Act of July 15, 1943, 57 Stat. 565 (see p. 3, *infra*).

provided when needed, or could not be provided without the imposition of an increased excessive tax burden or an unusual or excessive increase in the debt limit of the taxing or borrowing authority in which such shortage exists, the Federal Works Administrator is authorized, with the approval of the President, in order to relieve such shortage—

(a) To acquire, * * * improved or unimproved lands or interests in lands by purchase, donation, exchange, lease * * * or condemnation * * * for such public works.

The Act of July 15, 1943, 57 Stat. 565, an appropriation act, provided:

none of the funds authorized herein shall be used to acquire public works already operated by public or private agencies, except where funds are allotted for substantial additions or improvements to such public works and with the consent of the owners thereof * * *.

## STATEMENT

During World War II, the Federal Works Agency found it necessary to install a sewerage system for defense housing in Fairfax County, Virginia, and to utilize existing, privately-owned easements containing sewer pipes as a part of the trunk line of that system. Accordingly, on December 13, 1944, the United States filed a peti-

tion in condemnation and a declaration of taking to acquire a permanent easement for the construction and operation of sewer-pipe lines in land occupied by sewer pipes of the Belle Haven Realty Corporation in the real estate subdivision of Belle Haven. Estimated just compensation of $2.00 was deposited. On April 8, 1948, by amendments to the petition and declaration of taking, the scope of the taking was enlarged to include easements in additional lands in the subdivision and also title to all sewer mains previously constructed by the corporation in the area. An additional $1.00 was deposited. This was done under authority of Section 202 of the Act of June 28, 1941, 55 Stat. 361, 42 U.S.C. 1532, amending the Lanham Act of October 14, 1940, 54 Stat. 1125 (*supra*, p. 2).

The United States connected the outlets of the existing system to the sewer system it had constructed. It leased the entire system to the Board of Supervisors of Fairfax County with permission to make reasonable charges for the services. On November 4, 1948, the district court granted an application filed by several owners in the subdivision to intervene as holders of implied easements in the original system. 89 F. Supp. 571 (R. 1-4). They asked that the court, in lieu of compensation for the taking, fix the reasonable charge of disposing of their sewage and, in February 1950, they filed an application to restrain collection of any charges until the condemnation

proceedings were concluded. On March 30, 1950, the court denied the application and granted the Government's motion to strike from the answer the claim that the court should fix the reasonable charge of disposing of their sewage. 89 F. Supp. 567 (R. 4-10).

On April 27, 1950, the intervenors filed an amended answer denying the Government's authority to condemn, and asking restoration and return of the sewer system in its original condition. On December 14, 1950, the Belle Haven Corporation, which had not answered to this time, finally did so. It claimed as just compensation the present reproduction cost of the system less depreciation. On December 3, 1951, the district court entered judgment dismissing the condemnation proceding. It held that the amendment of the Lanham Act of July 15, 1943, 57 Stat. 565, in providing that public works already operated by public or private agencies should not be acquired "except * * * with the consent of the owners thereof" (*supra*, p. 3) required the consent not only of the Belle Haven Realty Corporation but also of those who were served by the sewerage system. It concluded that the corporation had only conditionally consented and that those who used the system had not been consulted. 101 F. Supp. 172 (R. 13-19).

The Court of Appeals affirmed on the ground that Section 202 of the Act of June 28, 1941

(*supra*, p. 2), did not authorize this condemnation. And, while approving the trial court's construction of the 1943 amendment, it declined to consider this provision because: "It is perfectly clear * * * that the power of condemnation given by the Lanham Act extends only to lands or interests in lands; and * * * there is nothing in the act which authorizes the condemnation of a public works system such as this. So far as the situation here is concerned, the [1943 amendment] merely emphasizes a lack of power to condemn which seems perfectly obvious without it." 196 F. 2d 657, 662 (R. 33-43).

## REASONS FOR GRANTING THE WRIT

1. Contrary to the decision below, the Lanham Act's general authorization of the condemnation of "improved or unimproved lands or interests in lands" permits acquisition of a perpetual easement in the lands here involved and the sewer pipes contained therein. The Court of Appeals held that since these pipes were already being used for sewage disposal, and in its view "already legally appropriated, to a public or quasi public use," the land could not be acquired under a statute containing a general authorization to condemn, but only under one which expressly or by necessary implication authorized its condemnation.

In so holding, the lower court has failed to follow this Court's decision in *United States* v.

*Carmack*, 329 U.S. 230, 242, in which it reversed the Court of Appeals for the Eighth Circuit for applying the same rule of construction to other condemnation statutes of the United States. In the *Carmack* case, the United States had sued to condemn, as the site of a post office and custom house, land owned by a Missouri municipality and used by it for a park, courthouse, city hall, and public library. The acquiring officials, the Federal Works Administrator and the Postmaster General, relied on the general Condemnation Act of August 1, 1880, 40 U.S.C. 257, authorizing the condemnation of "real estate" and the Public Buildings Act of May 25, 1926, 40 U.S.C. 341, authorizing condemnation of "sites and additions to sites." The Court of Appeals affirmed an order dismissing the proceeding on the ground that the statutes in question did not specifically authorize selection of property already devoted to public purposes. 151 F. 2d 881. This Court granted the Government's petition for certiorari, and reversed, saying (329 U.S. at p. 242): "We find in the broad terms of the Public Buildings Act authority for the designated officials to select the site they did. We find, in both Acts, authority for them to acquire by condemnation the site thus lawfully selected."

But in the case at bar the Court of Appeals for the Fourth Circuit has refused to find in the equally broad terms of section 202 of the Act of

June 28, 1941, authorizing acquisition of "improved or unimproved lands or interests in lands" (*supra*, p. 3); authority to condemn easements containing a local sewerage system.[2] If its judgment is not reversed, the decision will be a precedent in the Fourth Circuit for dismissing proceedings to acquire property devoted to public use, brought under the General Condemnation Act, the Public Buildings Act, or any other federal statute which does not specifically authorize acquisition of property of this character.[3]

2. The decision is also in conflict with that of the Court of Appeals for the First Circuit in *Puerto Rico Ry. Light & Power Co.* v. *United States*, 131 F. 2d 491. The court below asserted—incorrectly—that that case held that the Lanham Act did not authorize the acquisition of existing public works. Rather, the court in the First Circuit there held that, since section 202 of the 1941 Act only authorized the condemnation of "improved or unimproved lands or interests in lands", the Government could not condemn those parts of a public utility system which were personalty. It

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[2] The error of the lower court's construction is also manifest when regard is had to the 1943 amendment (*supra*, p. 3). If Congress had not previously authorized condemnation of [redacted] works, the amendment—imposing conditions upon their acquisition—would not have been needed.

[3] The opinion of the court below does not mention or refer to the *Carmack* case.

directed dismissal of the entire proceeding because affirmance of the district court's judgment on the declaration of taking as to the realty alone would irrevocably commit the United States to the payment of compensation "for something which the Federal Works Administrator might never have dreamed of taking had he correctly apprehended the limited scope of his powers under the act." Thus, contrary to the instant case, the *Puerto Rico* case does not hold that the Act fails to authorize the condemnation of lands devoted to existing public works. On the contrary, the First Circuit expressly declared that the Act was applicable to such lands and interests in land. 131 F. 2d at 499, 500.

3. It is, of course, well settled that the strict rule of construction, invoked by the court below, applies only to statutes delegating the power of eminent domain to utility corporations[4] and that it has no application to Acts of Congress authorizing government agencies to condemn. See *United States* v. *Carmack*, 329 U.S. 230, 243, fn. 13. The latter statutes invariably have designated the property to be acquired in general terms and have long been interpreted to authorize the condemnation of property devoted to public use for utility purposes or for streets, alleys, parks and the like. See *e.g.*, *United States* v. *City of Tiffin*,

[4] All of the cases cited in the opinion below at R. 39 deal with eminent domain powers delegated to utilities.

190 Fed. 279 (C.C. N.D. Ohio, 1911); *C. M. Patten & Co.* v. *United States*, 61 F. 2d 970, 971-973 (C.A. 9, 1932), decree vacated as moot, 289 U.S. 705; *United States* v. *Certain Parcels of Land*, 30 F. Supp. 372, 377 (D.Md. 1939); *United States* v. *Parcel of Land*, 32 F. Supp. 718, 721 (D.Del. 1940); *United States* v. *State of Montana*, 134 F. 2d 194, 196 (C.A. 9, 1943), certiorari denied, 319 U.S. 772.

The contrary construction by the Fourth Circuit in *United States* v. *Southern Power Co.*, 31 F. 2d 852 (1929), was relied on by the Eighth Circuit in *Carmack* v. *United States*, 135 F. 2d 196, 199-201 (1943) and *United States* v. *Carmack*, 151 F. 2d 881 (1945), which were reversed by this Court. 329 U.S. 230.[5]

4. The question thus presented is an important one. As was the fact at the time of the *Carmack* case, the Government is now engaged in the acquisition of great quantities of land needed for flood control, the armed forces, atomic energy

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[5] Although the Court of Appeals below expressed approval of the trial court's construction of the July 15, 1943, amendment to the Lanham Act, it declined to make this provision a basis for its judgment, saying: "So far as the situation here is concerned, the proviso [amendment] merely emphasizes a lack of power to condemn which seems perfectly obvious without it" (R. 42). Thus, the court below laid stress upon the fact that it has interpreted a federal condemnation statute in accordance with the rule of construction rejected by this Court in the *Carmack* case. Cf. *United States ex rel. T. V. A.* v. *Welch*, 327 U.S. 546, reversing 150 F. 2d 613 (C.A. 4, 1945).

development, and other national purposes. These acquisitions are generally accomplished by condemnation and, as has been pointed out (p. 9, *supra*), the statutes authorizing the institution of these proceedings designate the property to be acquired in general terms. Under the decision below, these statutes would not permit acquisition of properties already devoted to a public use which are not infrequently comprehended within the large areas needed. Thus, the doubts set at rest in the *Carmack* case are revived and obstacles erected to the expeditious execution of important governmental projects.

## CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

PHILIP B. PERLMAN
*Solicitor General.*

JULY 1952.

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only to lands or interests in lands; and * * * there is nothing in the act which authorizes the condemnation of a public works system such as this." 196 F. 2d at 662.

## SPECIFICATIONS OF ERRORS TO BE URGED

The court of appeals erred:

1. In holding that Section 202 of the Act of June 28, 1941 (the Lanham Act, as amended) did not authorize the condemnation of easements in lands which contain sewer pipes being used for sewage disposal and deemed to be "already legally appropriated, to a public or quasi-public use."

2. In failing to hold that the requirements of the Act of July 15, 1943, 57 Stat. 565, for acquisition of public works were satisfied in this case.

3. In affirming the judgment of the district court.

## SUMMARY OF ARGUMENT

### I

Section 202 of the Lanham Act, 55 Stat. 362, 42 U.S.C. 1532, *supra*, p. 3, authorizing the condemnation of "improved or unimproved lands or interests in lands" plainly authorizes, by its literal terms, the condemnation of easements in lands that contain sewer pipes used for sewage disposal. The holding of the court of appeals that statutory authority to condemn property already devoted to a public or quasi-public use must be expressly given

or necessarily implied" overlooks the distinction drawn in *United States* v. *Carmack*, 329 U.S. 230, between statutes delegating the power of eminent domain to utility corporations and Acts of Congress authorizing government agencies to condemn. The latter have invariably designated the property to be acquired in general terms and have always been interpreted to authorize the condemnation of property devoted to public use. This rule of interpretation was applied by this Court in the *Carmack* case.

The court of appeals erroneously stated that the decision in *Puerto Rico Ry. Light & Power Co.* v. *United States*, 131 F. 2d 491 (C.A. 1), and the enactment of the Act of July 15, 1943, 57 Stat. 565, *supra*, pp. 3-4, show that the Lanham Act did not authorize the acquisition of existing public works. Rather, the *Puerto Rico* case expressly recognized that the Act applied to lands or interests in lands used in connection with public works. The 1943 proceedings in the Senate, upon which the court below relied, also evince this construction of the Lanham Act.

II

The court of appeals was mistaken in its opinion that the district court rightly dismissed the condemnation proceeding because of non-compliance with the provision of the amendatory Act of July 15, 1943, conditioning acquisition of existing public works upon "the consent of the owners."

The answer of the corporate owner made no objection to maintenance of the proceeding and asked just compensation for the property. Statements in the answer, which the court below thought indicated that the owner had given its consent upon a condition the Government would not accept, merely show an unsuccessful attempt to agree upon the form and amount of compensation and not the imposition of a condition precedent to the taking itself. The further view of both lower courts that the users of the system were also "owners" within the meaning of the provision is erroneous. That construction would prevent the legal owner from disposing of public works even if it desired to do so, and, because of the virtual impossibility of obtaining unanimous consent of users of such works, would convert the provision into one prohibiting, rather than merely limiting, their acquisition. Moreover, the lot owners who used the sewer system were not its "owners" in any accepted or conventional sense.

III

Since there has been no trial, but merely a determination of certain issues of law on the pleadings, this Court should not consider contentions of respondents dependent upon factual determinations, such as whether the taking was for a federal purpose, whether the taking was necessary, whether funds were allotted for substantial improvements as required by the amendatory Act of

July 15, 1943, and whether the President's letter of authorization satisfied the requirements of Section 202 of the Lanham Act as to findings of a shortage of existing facilities.

## ARGUMENT

### I

### An Act of Congress Authorizing Acquisition of "Improved or Unimproved Lands or Interests in Lands" Authorizes Condemnation of Easements in Lands Which Contain Sewer Pipes Being Used for Sewage Disposal

1. Section 202 of the Lanham Act, as amended (p. 3, *supra*), authorizes the condemnation of "improved or unimproved lands or interests in lands" for "public works". The interests here taken are easements on lands containing underground sewer pipes, as well as title to the sewer mains. *Supra*, p. 4. Obviously, the easements are "interests" in "improved lands" (*United States* v. *Welch*, 217 U.S. 333, 339; *United States* v. *Dickinson*, 331 U.S. 745, 748, 751), and hence within the literal terms of Section 202. The sewer pipes, imbedded and fixed in the ground, are part and parcel of the "improved land" and as such also fall squarely within the statutory words. See *United States* v. *Sunset Cemetery Co.*, 132 F. 2d 163, 164-5 (C.A. 7); *Danville Holding Corp.* v. *Clement*, 178 Va. 223, 232-233; 1 Thompson, *Real Property* (Perm. ed. 1939), Sec. 177; 2 Tiffany, *Real Property* (3rd ed. 1939), Sec. 606. Both the easements and the mains were taken as part of a

larger sewer system to be constructed for defense housing in Fairfax County, *i.e.*, "public works necessary to the health, safety, or welfare of persons engaged in national-defense activities" (as the statute prescribes). There is, therefore, no doubt that the literal words Congress wrote into Section 202 authorize the present condemnation.

2. The court of appeals held, however, that the section, despite its terms, did not authorize the condemnation because it "is well settled that a general power of condemnation does not authorize the condemnation of property already legally appropriated to a public or quasi-public use, in the absence of legislative authority expressly given or necessarily implied" (R. 47). Thus, as respondents conceded in their brief in opposition (p. 8), the lower court apparently overlooked the distinction drawn in *United States* v. *Carmack*, 329 U.S. 230, between statutes delegating the power of eminent domain to utility corporations (p. 243, fn. 13) and Acts of Congress authorizing government agencies to condemn (p. 242).[2] Unlike statutes dealing with utilities, Acts of Congress comparable to the Lanham Act have invariably designated the property to be acquired in general terms and have long been interpreted to authorize the condemnation by the

[2] All of the cases cited in the lower court's opinion (R. 47) deal with statutes delegating the power of eminent domain to utility corporations. The opinion does not mention or refer to the *Carmack* case.

Government of property devoted to public use for utility purposes or for streets, alleys, parks and the like. See e.g., *United States* v. *City of Tiffin*, 190 Fed. 279 (C.C.N.D. Ohio); *C. M. Patten & Co.* v. *United States*, 61 F. 2d 970, 971-973 (C.A. 9), decree vacated as moot, 289 U.S. 705; *United States* v. *Certain Parcels of Land*, 30 F. Supp. 372, 377 (D. Md.); *United States* v. *Parcel of Land*, 32 F. Supp. 718, 721 (D. Del.); *United States* v. *State of Montana*, 134 F. 2d 194, 196 (C.A. 9), certiorari denied, 319 U. S. 772. This was the view authoritatively adopted by this Court in 1946 in *United States* v. *Carmack*, 329 U.S. 230, 242.[3]

In the light of respondents' concession, it is unnecessary to deal at length with the *Carmack* case. There, this Court reversed the Court of Appeals for the Eighth Circuit for applying to other condemnation statutes of the United States the strict rule of construction invoked in this case by the court below. The United States had sued to condemn, as the site of a post office and custom house, land owned by a Missouri municipality and used by it for a park, courthouse, city hall, and public library. The acquiring officials relied on the general Condemnation Act of August 1, 1880, 40

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[3] The contrary construction by the Fourth Circuit in *United States* v. *Southern Power Co.*, 31 F. 2d 852 (1929), was relied on by the Eighth Circuit in *Carmack* v. *United States*, 135 F. 2d 196, 199-201 (1943) and *United States* v. *Carmack*, 151 F. 2d 881 (1945), which were reversed by this Court in 329 U.S. 230.

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No. 253

# In the Supreme Court of the United States

OCTOBER TERM, 1952

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UNITED STATES OF AMERICA, *Petitioner*

v.

CERTAIN PARCELS OF LAND IN THE COUNTY OF FAIRFAX, COMMONWEALTH OF VIRGINIA, AND BELLE HAVEN REALTY CORPORATION, ET AL.

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On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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## BRIEF FOR THE UNITED STATES

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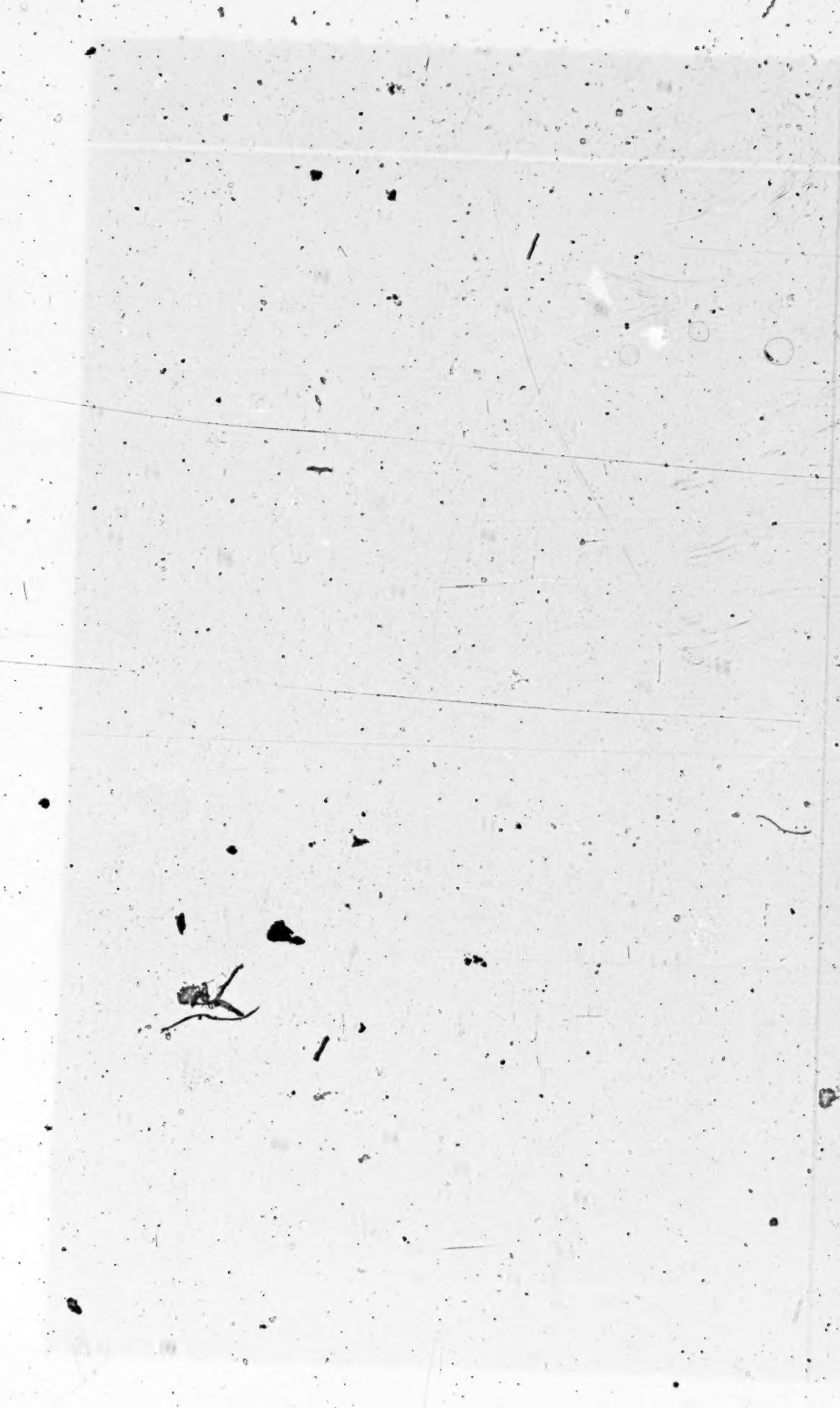

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# In the Supreme Court of the United States

OCTOBER TERM, 1952

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No. 253

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UNITED STATES OF AMERICA, *Petitioner*

v.

CERTAIN PARCELS OF LAND IN THE COUNTY OF FAIRFAX, COMMONWEALTH OF VIRGINIA, AND BELLE HAVEN REALTY CORPORATION, ET AL.

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**On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

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## BRIEF FOR THE UNITED STATES

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### OPINIONS BELOW

The opinion of the court of appeals (R. 43-50) is reported at 196 F. 2d 657. The district court's opinion of November 4, 1948 (R. 18-20) is reported at 89 F. Supp. 571, its opinion of March 30, 1950 (R. 24-28) is reported at 89 F. Supp. 567, and its

opinion of December 3, 1951 (R. 36-41) at 101 F. Supp. 172.

## JURISDICTION

The judgment of the court of appeals was entered on May 10, 1952 (R. 50). The petition for a writ of certiorari was filed on August 5, 1952, and was granted on October 13, 1952. The jurisdiction of this Court rests on 28 U.S.C. 1254.

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## QUESTIONS PRESENTED

1. Whether an Act of Congress authorizing the Federal Works Administrator, with the approval of the President, to condemn "improved or unimproved lands or interests in lands" authorizes the condemnation of easements in lands which contain sewer pipes being used for sewage disposal and deemed to be "already legally appropriated, to a public or quasi-public use."

2. Whether, under the Act of July 15, 1943, 57 Stat. 565, conditioning acquisition of public works upon "consent of the owners," a proceeding to condemn a sewerage system must be dismissed—although the legal owner does not object to its maintenance—because of the objections of householders served thereby.

## STATUTES INVOLVED

So far as material, Section 202 of the Act of June 28, 1941, 55 Stat. 361, 362, 42 U.S.C. 1532,

amending the Lanham Act of October 14, 1940, 54 Stat. 1125, provides:

> SEC. 202. Whenever the President finds that in any area or locality an acute shortage of public works or equipment for public works necessary to the health, safety, or welfare of persons engaged in national-defense activities exists or impends which would impede national-defense activities, and that such public works or equipment cannot otherwise be provided when needed, or could not be provided without the imposition of an increased excessive tax burden or an unusual or excessive increase in the debt limit of the taxing or borrowing authority in which such shortage exists, the Federal Works Administrator is authorized, with the approval of the President, in order to relieve such shortage—
>
> (a) To acquire, * * * improved or unimproved lands or interests in lands by purchase, donation, exchange, lease * * * or condemnation * * * for such public works.

The Act of July 15, 1943, 57 Stat. 565, an appropriation act, provides:

> none of the funds authorized herein shall be used to acquire public works already operated by public or private agencies, except where funds are allotted for substantial additions or

improvements to such public works and with the consent of the owners thereof * * *.

## STATEMENT

During World War II, the Federal Works Agency found it necessary to install a sewerage system for defense housing in Fairfax County, Virginia, and to utilize existing, privately-owned, easements containing sewer pipes as a part of the trunk line of that system. Accordingly, on December 13, 1944, the United States filed a petition in condemnation and a declaration of taking to acquire a permanent easement for the construction and operation of sewer pipes in land occupied by sewer pipes of the respondent Belle Haven Realty Corporation in the real-estate subdivision of Belle Haven. Estimated just compensation of $2.00 was deposited (R. 1-8). On April 8, 1948, by amendments to the petition (R. 9-10) and declaration of taking, the scope of the taking was enlarged to include easements in additional lands in the subdivision and also title to all sewer mains previously constructed by the Corporation in the area. An additional $1.00 was deposited. In consequence, the entire sewerage system of the Corporation, which moved the subdivision's sewage "by gravity" into the Potomac River (R. 35), was taken. This was done under authority of Section 202 of the Act of June 28, 1941, 55 Stat. 361, 42 U.S.C. 1532, amending the Lanham Act of October 14, 1940, 54 Stat. 1125 (*supra*, p. 3).

The United States connected the outlets of the existing system to the sewer system it had constructed. It leased the entire system to the Board of Supervisors of Fairfax County, effective in March, 1949, with permission to make reasonable charges for the services. Fairfax County apparently began to assess, in January, 1950, a monthly charge of $2 against the users of the system, including owners who had used the original Belle Haven system.

In August 1948, several owners in the Belle Haven subdivision applied to intervene in the condemnation proceedings as holders of implied easements in the original system. They alleged that they (and their predecessors) had paid *pro rata* for the installation of the Belle Haven sewer system as part of the purchase price of the individual lots in the subdivision, and that they thereby acquired easements with respect to the system and the right to use it free of charge. In their original applications, these intervenors asked that the court, in lieu of compensation for the taking, fix the reasonable charge of disposing of their sewage (R. 10-13). On November 4, 1948, the district court granted the petition to intervene, without passing on the intervenors' rights to an award of just compensation or to some arrangement in lieu of just compensation. R. 21-22; 89 F. Supp. 571. In February 1950, the intervenors filed an application to restrain collection of any charges until

the condemnation proceedings were concluded (R. 22-23). On the ground that it was powerless to limit the Government or the Government's lessee in their use or control of the sewer system, the district court, on March 30, 1950, denied the intervenors' application and granted the Government's motion to strike the demand in the intervenors' answer that the court should fix the reasonable charges of disposing of their sewage. The intervenors were granted permission to amend their answer. (R. 29-30; 89 F. Supp. 567.)

On April 28, 1950, the intervenors filed an amended answer denying the Government's authority to condemn, and asking restoration and return of the sewer system in its original condition (R. 30-32). On December 14, 1950, respondent Belle Haven Realty Corporation, which had not answered the condemnation petition to that time, finally did so (R. 33-34). It claimed as just compensation the present reproduction cost of the system less depreciation.[1]

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[1] The Corporation's answer stated that out of discussions with Government representatives "there arose an agreement that this defendant [*i.e.*, the Belle Haven Realty Corporation] would accept nominal damages of $1.00 provided that the entire system in Belle Haven be taken including all laterals, and that in the final order it be provided that there be no maintenance, operation, construction, re-construction, replacements, or assessment charges against any lot, lots or parts of lots within the recorded subdivision of Belle Haven made and recorded prior to January 1, 1943; that there be no maintenance, operation, construction, re-construction, re-

On December 3, 1951, the district court entered judgment dismissing the condemnation proceeding. It held that the amendment of the Lanham Act of July 15, 1943, 57 Stat. 565, in providing that public works already operated by public or private agencies should not be acquired "except * * * with the consent of the owners thereof" (*supra*, pp. 3-4), required the consent not only of respondent Belle Haven Realty Corporation but also of those who were served by the sewerage system. It concluded that the Corporation had only conditionally consented and that those who used the system had not been consulted. 101 F. Supp. 172 (R. 36-41).

The court of appeals affirmed on the ground that Section 202 of the Act of June 28, 1941 (*supra*, p. 3), did not authorize this condemnation. 196 F. 2d 657; R. 43-50. And, while approving the trial court's construction of the 1943 amendment, it declined to consider this provision because (R. 49): "It is perfectly clear * * * that the power of condemnation given by the Lanham Act [*i.e.*, Section 202 of the Act of June 28, 1941] extends

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placements, or assessment charges against any lots to be created abutting or being sewered into those sewers now built and existing in easements, dedicated streets, or proposed streets either in Belle Haven or New Alexandria as shown on plat prepared by Massey and Johnson January 16, 1943" (R. 34). The Corporation's answer also stated that its "agreement to accept nominal damages" was based on this agreement and that "it does not now believe that its understandings and proposed stipulations have been complied with" (R. 34).

pp. 2, 4-5, 9); (c) there is no showing that funds were allotted for substantial additions or improvements to the public works condemned, as required by the 1943 Act (*supra*, pp. 3-4) (see Br. in Opp., p. 2); and (d) that the requirements of Section 202 of the 1941 Act as to a Presidential finding (*supra*, p. 3) were not fulfilled (see Br. in Opp., pp. 9, 12). If the case is remanded and any of these subsidiary issues is deemed worthy of a trial, and properly a matter for judicial decision, the Government will make the required showing. To decide these issues now, adversely to the United States, on the basis of statements in the opinion of the court below, respondents' answers, and a short, uncalled-for affidavit (R. 34-35), is to deprive the United States of its right to a trial of such of these issues as may be triable. Cf. *Fountain* v. *Filson*, 336 U.S. 681.

2. Since the record does contain the President's letter of authorization (R. 36), we shall treat in greater detail the argument that Section 202 of the 1941 Act (*supra*, p. 3) required the President specifically to find, first, that there was an acute shortage of sewer facilities in the Belle Haven subdivision, and, second, to approve the particular means adopted by the Federal Works Administration to relieve the shortage, *i.e.*, the acquisition of the existing system (see Br. in Opp., pp. 2, 9, 12). Respondents rely on *Puerto Rico Ry. Light & Power Co.* v. *United States*, 131 F. 2d 491, 496 (C.A. 1), in which the court held that a letter

from the President, substantially like that involved here, did not show that he had approved the condemnation of utility properties "extending over thirty-five municipalities in the Island of Puerto Rico" and that "Congress never intended to commit to the Administrator the discretion to embark upon any such expensive program of condemnation as here presented, without specific approval by the President."

In this case, the President found that in various places in Fairfax County, Virginia, sewer facilities estimated to cost $936,000 for the entire project were required, and authorized the Federal Works Administrator to relieve the shortage by any of the methods prescribed by the Lanham Act (R. 36). The circumstances are obviously far different from those, involving a large island-wide utility system, which led the First Circuit, in the *Puerto Rico* case, to conclude that undue discretion had been exercised by the Administrator. And since the Belle Haven sewer system was but a small adjunct to the Fairfax County sewer project, it verges on the absurd to call for a Presidential decision as to whether this particular sewer system should be acquired as part of the County project and, if so, by what means. In passing the Lanham Act in October 1940, and amending it in June 1941, Congress plainly did not demand that degree of particularity from the President in a time of national emergency and war.

## CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment below is erroneous, and should be reversed.

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U.S.C. 257, authorizing the condemnation of "real estate" and the Public Buildings Act of May 25, 1926, 40 U.S.C. 341, authorizing condemnation of "sites and additions to sites." The court of appeals affirmed an order dismissing the proceeding on the ground that the statutes in question did not specifically authorize selection of property already devoted to public purposes. 151 F. 2d 881. This Court granted the Government's petition for certiorari, and reversed, saying (329 U.S. at p. 242): "We find in the broad terms of the Public Buildings Act authority for the designated officials to select the site they did. We find, in both Acts, authority for them to acquire by condemnation the site thus lawfully selected." The equally broad terms of Section 202 authorized the condemnation of the interests in land sought in the case at bar.

3. To support the erroneous holding below, both the court of appeals (R. 47) and respondents aver that the Court of Appeals for the First Circuit, in *Puerto Rico Ry. Light & Power Co.* v. *United States*, 131 F. 2d 491 (1942), decided that, despite the broad words used in Section 202, it was not the "intention of Congress" to authorize the acquisition of existing public works, and that Congress expressed the same view when thereafter it enacted the Act of July 15, 1943 (*supra*, pp. 3-4). This contention reflects a misunderstanding of the *Puerto Rico* decision and the circumstances of the enactment of the 1943 statute.

The *Puerto Rico* decision was that since Section 202 authorized the condemnation only of "improved or unimproved lands or interests in lands," the Government—which had attempted to take an entire Puerto Rican utility system—could not condemn those parts of the utility system which were *personalty*, because no general authority had been given to take either personal property or "public works" as a whole.[4] The appellate court directed dismissal of the entire proceeding because affirmance of the trial court's judgment as to the realty alone would irrevocably commit the United States to the payment of compensation "for something which the Federal Works Administrator might never have dreamed of taking had he correctly apprehended the limited scope of his powers under the act. Taking appellant's lands and easements would quite effectively dismember a going concern, but it is not obvious that this would contribute to the relief of a shortage in electrical transmission and distribution facilities." (p. 500). Thus, contrary to the view of the court of appeals in the present case, the *Puerto Rico* case does not hold that the Lanham Act fails to authorize the condemnation of lands devoted to existing public works. On the contrary, the First Circuit expressly de-

[4] The court found that "all the properties of appellant [the utility company], real and personal, have been taken over as a going concern", (p. 497). The personal property included machinery, rolling stock, implements, automative equipment, generators, telephone equipment, etc. (pp. 496-7, 499-500).

clared that the Act was applicable to such lands and interests in land, and clearly contemplated that lands and easements owned by a public utility could be taken. 131 F. 2d at 499, 500.

The congressional proceedings in respect of the Act of July 15, 1943 (amending the Lanham Act), upon which the court of appeals and respondents also rely, similarly fail to support the holding below. They show that the Senate first adopted an amendment providing that "none of the funds authorized herein shall be used to acquire public works already operated by public or private agencies" (89 Cong. Rec. 7286-7287), but that the following day the amendment was modified by the addition of the words "except where funds are allotted for substantial additions or improvements to such public works and with the consent of the owners thereof" (89 Cong. Rec. 7314). In this form the measure became law. *Supra*, pp. 3-4. It is thus apparent that Section 202, as originally enacted in 1941, permitted acquisition of existing public works. For if Congress had not previously authorized condemnation of public works in Section 202, the proposed prohibition against acquisition would have been unnecessary, as also would have been the modification of it which became law. And if Section 202, as passed in 1941, did not authorize the taking of land devoted to the uses of an existing public utility, the 1943 amendment's exception from its prohibitory provisions of in-

stances where the owners consented to the taking would be fruitless; no authority to take would exist even in such a case.[5]

## II

### The Provision of the Act of July 15, 1943, Conditioning Acquisition of Existing Public Works Upon Consent of the Owners, Is Complied With When the Legal Owner Files an Answer in Condemnation Making No Objection to the Proceeding

While the court of appeals expressly declined to put its decision upon the Act of July 15, 1943, 57 Stat. 565 (*supra*, pp. 3-4), on the basis of which the condemnation proceeding had been dismissed by the district court (R. 36-41; *supra*, p. 7), it made plain that it agreed with the trial court on this point (R. 48-49). Accordingly, we shall undertake to show here that the condition imposed by the 1943 Act was met.

1. The 1943 Act forbade, in effect, the acquisition of "public works already operated by public

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[5] The 1943 statement of Senator Taft, quoted below (R. 47-48), seems to us to go no further than to agree with the First Circuit that the Lanham Act did not authorize the taking of a complete electric utility system, including its personal as well as its real property. If, however, the Senator meant, as the Fourth Circuit thought, that no land used by an existing utility could be condemned under the Lanham Act, his 1943 views were contrary to the words of the 1941 Act, as well as to the 1942 *Puerto Rico* opinion of the First Circuit. Subsequent legislative history of this type cannot "supplement the contemporaneous intent of the Congress which enacted" the Lanham Act. *Fogarty* v. *United States*, 340 U.S. 8, 13-14.

or private agencies", except "with the consent of the owners thereof." Whatever may be the meaning of "owners", as it is used in this Act, it certainly comprehends the Belle Haven Realty Corporation. That Corporation consented unconditionally to the acquisition by filing on December 14, 1950, an answer in which—raising no objections to the maintenance of the proceedings[6]—it asked as just compensation for the taking the reproduction cost of the system less depreciation. *Supra*, p. 6; R. 33-34.

Nonetheless, the court of appeals agreed with the trial court that the Corporation's consent did not comply with the statute because it "was given upon a condition which the Government is unwilling to accept" (R. 49). This conclusion was based solely on the last paragraph of the Corporation's answer, stating in effect that in 1943 the Corporation had agreed to accept nominal compensation on condition that the final judgment in the condemnation proceedings should provide that no charges would be imposed on owners of lots in the Belle Haven subdivision for the cost of operating and maintaining the sewer system. *Supra*, fn. 1, pp. 6-7. This is merely an allegation that an attempt had been made to agree amicably upon the amount and form of compensation for the taking, and not that the owner had imposed an unfulfilled condition prece-

[6] Unlike the intervenors, the Corporation did not ask that the condemnation proceedings be dismissed.

dent to the Government's acquisition of the property. The Corporation's answer (R. 33-34) makes it quite clear that the allegations concerning the earlier conditional agreement to accept nominal compensation were included solely in order to explain the Corporation's refusal, in 1950, to accept nominal damages and its demand, at that time, for full reproduction cost less depreciation. Consequently, there is nothing which qualifies the Corporation's consent to the condemnation. All that has happened is that the Corporation has withdrawn its earlier agreement to accept nominal damages and now asks for substantial monetary compensation.[7]

2. The court of appeals also agreed with the trial court's further holding that the 1943 Act required the consent of everyone who was served by the system and hence that, since some of the lot owners objected to the Government's acquisition, the condemnation proceeding had to be dismissed. A brief consideration of the results of this interpretation of the 1943 Act demonstrates the error of the courts below.

The 1943 Act applied to all acquisitions whether voluntary or by condemnation. Under the construction placed upon it by the lower courts, the

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[7] This case is here on the pleadings; there has been no trial. If the Corporation's answer leaves any doubt as to the quality of its consent to condemnation, a trial on this issue will demonstrate that the consent was complete and unqualified.

Corporation could not even have *sold* the system to the United States unless all the lot owners agreed. On that view, the statute would have divested the Corporation of the powers of management and control ordinarily inherent in ownership. Such a construction is obviously unacceptable and should not be adopted unless there is no alternative. Here, there is the wholly acceptable alternative of reading the word "owners" in its ordinary sense of proprietor of the property and holder of fee title.

Furthermore, it is evident that such a construction would make practically impossible the acquisition of existing public works. By the Lanham Act, Congress had authorized the acquisition of works like the sewerage system here involved where that could be accomplished by acquisition of lands or interests in lands. *Supra*, pp. 3, 11-16. However, by the 1943 Amendment it declared that where such a public work was already operated by a public or private agency it could be acquired only with the consent of the owner. It limited the authority to acquire by granting the owner arbitrary power to prevent the acquisition. Of course, Congress knew that there would be many users of such public works, and it was apparent that it would be virtually impossible to secure their unanimous consent. Thus, a Congressional definition of "owners" which would require the consent of every user would have been tantamount to

a prohibition against acquisition. Yet, as the proceedings in the Senate show (*supra*, pp. 16-17; R. 47-48), the 1943 Act did not prohibit, but merely limited, acquisition. And the very example used by Senator Taft, in proposing the 1943 modification, shows that a railroad could be acquired if the railroad company was willing; consent of shippers or passengers was not mentioned by the Senator and was obviously thought to be unnecessary. It follows that a construction which in effect converts the limitation of the Act into a prohibition, by requiring the consent of each of the many users, is a misconstruction of the statute and goes beyond the legislative purpose.

It does not make any difference that the Corporation added the cost of installing the sewer system proratably to the purchase price of the individual lots in the subdivision (R. 11) or that these lot owners may have an implied easement of some kind in the sewer system (R. 18-20). It is common for users of utility services to pay the capital costs of the utility by way of special assessments or as part of the fees charged by the utility for the service. Such payments do not make the users the legal owners of the utility property; the utility company or the municipality retains the legal title and controls and manages the utility's affairs. The customers may obtain a legal right to continued service but they are not "owners". It may even be, as the district court

held, that such payments give the lot owners an "implied easement" "in and to" the sewer system (R. 25), but persons with easements in and rights to use a piece of property cannot be deemed its "owners", either in the conventional sense or as that term is employed in the 1943 Act. Their easement, as the district court's first opinion shows (R. 18-20), is little more than a right to continue to use the sewer system. If this right has been invaded or limited by the Government's taking, the lot owners may possibly be entitled to just compensation. But they are not transformed into the system's "owners". They may own an easement in the land and the sewers, but they do not own the land or the sewers themselves.[8]

## III

### No Other Issues Are Properly Before This Court

In the court of appeals and in their brief in opposition (pp. 2, 4-5, 9, 10-11, 12), respondents have sought to raise certain other issues which we believe are not ripe for judicial determination. In anticipation that these issues will again be raised and because the court of appeals seemed to incline

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[8] It is significant that the Restatement of Property, in the introductory note to its restatement of easements, distinguishes between one who has a privilege of use for a special purpose (*i.e.*, an easement) and "the owner of the land used". A.L.I. *Restatement of Property*, Vol. V ("Servitudes"), Part I ("Easements"), "Introductory Note", pp. 2897-8; see also, to the same effect, Sec. 450, Comment f., p. 2905.

favorably toward some (R. 48-49), we deal with them here.

1. The most important thing to be said about these additional issues is that most, if not all, depend upon respondents' version of the facts, and there has been no trial or contest of facts. Thus far, only legal issues have been mooted and decided. The district court rested its judgment of dismissal on its view of the legal requirements of the 1943 Act. The court of appeals affirmed on its view of the authority granted by the Lanham Act, as amended in 1941, with respect to lands used for existing public works. And the trial court has not found, or even been asked to hear and decide, any of the factual issues to which respondent refers.[9] There has not even been a motion for summary judgment. Accordingly, there is clearly no place, at this stage of the proceedings, for the contentions that (a) the Belle Haven sewer system was acquired for the sole purpose of turning it over to Fairfax County for a non-federal use (see R. 31; Br. in Opp., pp. 4-5); (b) the taking was wholly unnecessary (see Br. in Opp.,

[9] With the possible exception of the Corporation's allegations in its answer that it agreed with the Government, in 1943, to accept nominal damages if the lot owners were freed from all charges. The court of appeals declared that the district court made such a finding on the basis of pre-trial conferences (R. 45). In our discussion in Point II, *supra*, pp. 17-22, we have assumed the Corporation's allegations as facts.

to defray the costs of maintenance and operation of their sewer system: that is, that the [illegible]e protected from being required to pay any part of the amortization of the cost of the trunk line or other part of the sewer system. The Government's motion to strike out this prayer raised the question of whether or not this court could, over its protest, impose such a limitation on the Government's taking.

Inasmuch as the Belle Haven householders had a sewer system ample for their needs, which they had paid for as part of the purchase prices of their lots, the contention of the intervenors did not seem to me unreasonable. However, I came to the conclusion that, without its consent, under the law I was powerless to impose any such limitation or condition on the Government's taking. This opinion is reported as *United States* v. *Certain Parcels of Land in Fairfax County, Virginia, et al.* (*Davis, Intervenor, et al.*), 89 F. Supp. 571.

The intervenors, being allowed to amend their answers, have filed answers * * * directly attacking the authority of the Government to acquire their sewer system by condemnation and praying that the Government be required to restore their sewer system to the condition in which it was before the Government's taking." (R. 16-17)

The property owners contended that the original Lanham Act (the basic authority relied on by the Government for the taking) did not authorize condemnation of an existing utility; and that furthermore such a taking was affirmatively forbidden by the 1943 amendment to the Act. The District Court set aside the taking on the second ground (R. 19), without passing upon the first (R. 17). The Court of Appeals affirmed on both grounds,[4] stating:

"That is was not the intention of Congress to authorize the acquisition of existing public works systems

[4] The petition here erroneously states that "Although the Court of Appeals below expressed approval of the trial court's construction of the July 15, 1943, amendment to the Lanham Act it declined to make this provision a basis for its judgment * * *." (p. 10, n. 5.)

under the Lanham Act was not only decided, and we think correctly so, in *Puerto Rico Ry. Light & Power Co.* v. *United States, supra*, but was also expressed subsequent to that decision by Congress itself in the act of 1943 increasing the appropriation for the acquisition of property under the Lanham Act." (R. 39).

## ARGUMENT

The petition here is based on two grounds: first, an extraordinary attempt to interpret the ground for decision below as being that property already devoted to a public use can be condemned, even by the sovereign, only under a statute which expresly or by necessary implication authorized the taking of such property (Petition, Reasons for Granting the Writ 1, 3, and 4); and, second, a contention that the decision below is in conflict with that of the Court of Appeals for the First Circuit in *Puerto Rico Ry. Light & Power Co.* v. *United States*, 131 F. 2d 491 (id., Reason 2). We submit that the first ground is based on a plain distortion of the opinion below; and that the decision in the First Circuit is squarely in accord with the decision below.

### I.

### The Dictum in Question Was Wholly Immaterial to the Decision Below

Petitioner's first point is based on the following passage in the opinion below:

> "A sewer system is a system of drainage pipes, not lands or interests in lands. Easements in land are essential to the maintenance of such a system; but the power to condemn easements in order that a system may be constructed does not carry with it the power to condemn an existing system. *Puerto Rico Ry. Light & Power Co.* v. *United States*, 1 Cir., 131 F. 2d 491, 499. Counsel for the government asserts the contrary, but they cite no authority to sustain their position, and we know of none. The rule is well settled that a general power of condemnation does not authorize the condem-

nation of property already legally appropriated to a public or quasi public use, in the absence of legislative authority expressly given or necessarily implied. 18 Am. Jur. 723-724; 29 C. J. S. 866; 10 R. C. L. 198-199; note 173 A. L. R. 1379; *Alexandria & F. R. Co.* v. *Alexandria & W. R. Co.*, 75 Va. 780, 40 Am. Rep. 743; *Vermont Hydro-Electric Corp.* v. *Dunn*, 95 Vt. 144, 112 A. 223, 12 A. L. R. 1495; *Old Colony R. Co.* v. *Framingham Water Co.*, 153 Mass. 561, 27 N. E. 662; 13 L. R. A. 332. A fortiori a general power to condemn lands may not be construed to authorize the condemnation of a public works system merely because easements in land are appurtenant thereto. This would seem to be elementary." (R. 38-39).

Apparently the court's statement as to the rule of construction with respect to property already devoted to a public use overlooks the distinction mentioned by this court, in *United States* v. *Carmack*, 329 U. S. 230, 243, fn. 13, as between takings by public utilities and by the sovereign. But—in the context of the entire opinion, and the entire situation here—what possible difference does it make? In the first place, the statement in question was made merely as a premise for an "a fortiori" conclusion which must, we think, be indisputable, namely that

> "* * * a general power to condemn lands may not be construed to authorize the condemnation of a public works system merely because easements in land are appurtenant thereto." (R. 39).

As Chief Judge Parker says, "this would seem to be elementary" (R. 39), although it fairly summarizes the Government's attempt to bring this taking within an act which authorized condemnation only of "improved or unimproved lands or interests in lands" (Lanham Act, sec. 202(a), *supra* at p. 3). But, in any event, no rules of construction need be resorted to in order to conclude—as has the court below, and the Court of Appeals for the First Circuit—that the Lanham Act did not authorize the condemnation of existing utilities.

*The Original Lanham Act.*

The legislative history of the Act, which is discussed in the opinion in the First Circuit,[5] shows that the purpose of this defense statute was to provide public services in areas congested by the defense effort, where no such services, or inadequate ones, existed. Pursuant to this purpose, it is clear on the face of the Act that the Government's authority under it is limited, as far as condemnation is concerned, to the taking of land upon which to construct public works. The only power granted with respect to the acquisition of existing public works is that in section 202(b) to "lease public works" (see p. 3, *supra*).

Moreover, even if the power of condemnation had been extended to existing facilities, it would have been restricted, under the Act, to facilities which had to be acquired in order to carry out the purposes of the Act, namely, to provide a necessary service to some locality where there was "an acute shortage of public works or equipment for public works necessary to the health, safety, or welfare of persons engaged in national-defense activities * * *" (sec. 202, first paragraph). There was no shortage of sewer facilities in the Belle Haven subdivision itself (R. 16); and since the Belle Haven system is on a hill which would not have permitted flowage from the trunk (gravity) system, its taking was not only unnecessary to, but not even usable for the construction or operation of the trunk system (R. 28).

*The 1943 Amendment.*

If there could otherwise be any doubt as to the intent of the original Lanham Act, it would have been set at rest by an authoritative expression from Congress itself at the time of the 1943 amendment to the Act. The District Court rested its decision on this ground alone.

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[5] *Puerto Rico Ry. Light & Power Co.* v. *United States*, *supra*, 131 F. 2d 491, 495.

The amendment in question was to the appropriation provision of the Act, and provided as follows:

> "* * * Provided further, That (a) none of the funds authorized herein shall be used to acquire public works already operated by public or private agencies, except where funds are allotted for substantial additions or improvements to such public works and with the consent of the owners thereof, * * *." (Act of July 15, 1943, 57 Stat. 565, as amended July 3, 1945, 59 Stat. 383, 42 U. S. C. A. sec. 1534, note.)

As indicated by its legislative history the basic prohibition contained in this proviso was purely declaratory of the intent of Congress with respect to the original Lanham Act, while the excepting clause was intended to open the door to acquisition of existing public works in a few isolated cases where everybody concerned might consent. The relevant legislative history is set forth in the opinion below (R. 39-41). The attention of the court is particularly invited to Senator Taft's statement, with respect to the acquisition of existing public works, that

> "* * * certainly there was nothing in the Lanham Act which authorized any such proceeding. *It was intended to provide new facilities, it was not intended to provide for taking over old facilities.* I think it is perfectly clear that no such power should be included in the Act." (R. 40) (Emphasis supplied)

It is also important to note that Senator Taft's statement was expressly concurred in by Senator Maloney, who was in charge of the pending bill in 1943 and who had been chairman of the committee which reported out the original Lanham Act. (Cong. Rec., July 6, 1943, p. 7287)

For the reasons indicated by both courts below, the conditions attached to the operation of the excepting clause in the amendment were not satisfied. There was no allotment of funds for additions or improvements to the Belle Haven sewer system—there were no additions or improvements of

any sort to the system. Nor was the consent of the owners obtained. The development company, which held legal title to the system, finally consented (after the system had been forcibly altered by the Federal Works Agency), on condition that no service charges be imposed against the then or future owners of property in Belle Haven for the use of their own system. When the Government's lessee, Fairfax County, commenced to charge the property owners two dollars a month for such use this condition was obviously violated. No consent whatever was obtained from the property owners who had paid for the system and are, as the Court of Appeals said, "as truly the real owners of that system as if it had been built by them as a cooperative enterprise" (R. 43).

It is accordingly submitted that the dictum which petitioner asks this court to correct was utterly immaterial to the decision, which was compelled on other specific grounds. And since this court has already (in the Carmack case) made explicit the correct statement of the rule of construction in question, it is not apparent how a different statement, even if it had been a ground of decision, could become precedent in the Fourth (or any other) Circuit.

## II.

### There is no Conflict of Decision

Petitioner also relies, apparently as an afterthought, on a claim that the decision below is in conflict with that in the First Circuit in *Puerto Rico Ry. Light and Power Co.* v. *United States*, 131 F. 2d 491 (1942). As will appear from the opinion in that case, the decision is not only not in conflict but is precisely to the same effect as the decision below. Petitioner's contention to the contrary is based—like its other contentions here—on selected words in the course of a long opinion. There can be no question as to what the court held, which was that the taking of an existing utility—there an electric system—was not authorized by the original

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IN THE

# Supreme Court of the United States

OCTOBER TERM 1952

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UNITED STATES OF AMERICA,

v.

CERTAIN PARCELS OF LAND IN THE COUNTY OF FAIRFAX, COMMONWEALTH OF VIRGINIA, AND BELLE HAVEN REALTY CORPORATION, ET AL.

---

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.**

---

## BRIEF FOR RESPONDENTS IN OPPOSITION

---

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.**

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## BRIEF FOR RESPONDENTS IN OPPOSITION

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### OPINIONS BELOW

The opinions of the Court of Appeals (R. 33) is reported at 196 F. 2d 657. The several opinions of the District Court are reported at 89 F. Supp. 567 and 571, and 101 F. Supp. 172.

### JURISDICTION

The judgment of the Court of Appeals was entered May 10, 1952 (R. 45). The petition for writ of certiorari was

filed on August 5, 1952. The jurisdiction of this court is invoked under 28 U. S. C. 1254(1).

## QUESTIONS PRESENTED

1. Whether the taking of the Belle Haven sewer system was necessary for any public use.

2. Whether the condemnation of an existing utility was authorized by the original "Lanham Act";[1]

a) If so, whether the statutory prerequisites for such a taking were complied with in taking the Belle Haven sewer system.

3. Whether the taking of the Belle Haven sewer system was prohibited by the 1943 amendment to the Lanham Act expressly forbidding acquisition of existing public works "except where funds are allotted for substantial additions or improvements to such public works and with the consent of the owners thereof," where

a) the record showed no allotment of funds for additions or improvements to the Belle Haven sewer system; and

b) the corporate holder of legal title consented to the taking only on a condition not fulfilled, and no consent was given by the abutting property owners who paid for the system and are required to use it.

## STATUTES INVOLVED

Act of October 14, 1940 (Lanham Act), Title II, section 202, as added June 28, 1941, 55 Stat. 362, 42 U. S. C. 1532:

> "Whenever the President finds that in any area or locality an acute shortage of public works or equipment for public works necessary to the health, safety, or welfare of persons engaged in national-defense activities exists or impends which would impede national-

[1] Act of October 14, 1940, Title II, sec. 202, as added June 28, 1941, 55 Stat. 362, 42 U.S.C. 1531-1534.

defense activities, and that such public works or equipment cannot otherwise be provided when needed, or could not be provided without the imposition of an increased excessive tax burden or an unusual or excessive increase in the debt limit of the taxing or borrowing authority in which such shortage exists, the [Federal Works Administrator][2] is authorized, with the approval of the President, in order to relieve such shortage—

"(a) To acquire * * * improved or unimproved lands or interests in lands by purchase, donation, exchange, lease * * * or condemnation (including proceedings under sections 257, 258, 361-368 and 258a-258e of Title 40, for such public works).

"(b) * * * to lease public works * * *."

Act of July 15, 1943, 57 Stat. 565, as amended July 3, 1945, 59 Stat. 383, 42 U. S. C. A. 1534, note (amending the appropriations provision of the Lanham Act) provided in relevant part as follows:

"* * * Provided further, That (a) none of the funds authorized herein shall be used to acquire public works already operated by public or private agencies, except where funds are allotted for substantial additions or improvements to such public works and with the consent of the owners thereof * * *."

## STATEMENT OF THE CASE

The subdivision of Belle Haven, in Fairfax County, Virginia, was developed by respondent Belle Haven Realty Corporation beginning in the 1920s. In accordance with the contracts between the Realty Corporation and the purchasers of lots, a sanitary sewer system was installed, progressively, beginning about 1925. This was a completely integrated and independent system with its own outfalls into the Potomac River (R. 14). The deeds[3] to the pur-

[2] During all times relevant here the cognizant official was the Federal Works Administrator. The statute now reads "Housing and Home Finance Administrator."

[3] Typical contract and deed appear at page 117 of the typewritten record on file with the clerk.

chasers of lots made no specific reference to the sewer system, but did carry all "appurtenances"; and they referred to certain restrictive covenants which included a prohibition against septic tanks. The system was paid for by the lot owners, pro rata, as part of the purchase price of their lots (R. 16). About 1942 the Federal Works Agency commenced construction of a large sewer project to serve other areas of Fairfax County which were then being built up in order to house defense workers (R. 14). This system (hereinafter sometimes referred to as the "trunk system") had its outlet in the Potomac River east of the hill occupied by Belle Haven. About 1944 a lateral line was run by the Federal Works Agency from Fair Haven, a subdivision to the west of Belle Haven, into the trunk line. This lateral was cut into the west outfall line of the Belle Haven system, running along the foot of Belle Haven hill; and thereupon the Federal Works Agency blocked off the original outfalls of the Belle Haven system and diverted its sewage through the main outlet of the trunk system (R. 28). As described in the affidavit of Edward S. Holland, Civil Engineer:

> "The trunk system is thus a gravity system running past the foot of Belle Haven hill. The only benefit from an engineering standpoint received by the trunk system from the Belle Haven system was the convenience of flowing the Fair Haven sewage through portions of the Belle Haven west outfall. The taking of the main Belle Haven system in 1948 contributed nothing whatever from an engineering standpoint to the trunk system, and was totally unnecessary for the construction or operation of the trunk system. The Belle Haven system gained no benefit whatever from being connected to the trunk system." (R. 29)

Despite the fact that the Belle Haven system was unrelated to and unusable by the trunk system, the Government on April 8, 1948, filed its petition for condemnation of the Belle Haven system; and title was taken immediately under the Declaration of Taking Act (R. 13). On March 4, 1949,

the Belle Haven system was covered under a pre-existing lease of the trunk system to Fairfax County. Since that time the trunk system and the Belle Haven system have been sold to Fairfax County, in accordance with an original plan to that effect.

None of these transactions regarding their sewer system was consented to by the Belle Haven property owners. After the Belle Haven outfalls had been blocked off by the Federal Works Agency, respondent Belle Haven Realty Corporation consented to condemnation of the rest of the system on condition that no charge would be made against the then or future owners of property in Belle Haven for the use of their own sewer system (R. 14-15).

The Belle Haven sewer system was maintained by the Belle Haven Realty Corporation without charge to the property owners until it was taken over by the Federal Works Agency (R. 14). Even prior to the inclusion of the Belle Haven system in its lease Fairfax County attempted to charge the Belle Haven property owners two dollars ($2.00) a month as a sewer service charge. This amount was substantially in excess of the reasonable cost of operation and maintenance, and the surplus was, pursuant to the lease from the Federal Works Agency, to be applied by Fairfax County against its purchase price of the trunk system. Upon the attempt to collect such a charge the property owners in Belle Haven, through the three named intervenors below, moved for leave to intervene in the condemnation proceeding (R. 15), in which only the Belle Haven Realty Corporation was originally named as defendant. Over the Government's objection the District Court granted the motions to intervene, and the property owners filed answers. Quoting here from the final opinion of the District Court:

> "In their answers, intervenors waived any claim to monetary reimbursement provided the court included in its judgment of taking a stipulation that neither they, nor other lot owners similarly situated, be required to pay any service charge greater than enough

Act of July 15, 1943, 57 Stat. 565, 42 U.S.C. 1534, note (amending the appropriations provision of the Lanham Act) provided in relevant part as follows:

> "* * * Provided further, That (a) none of the funds authorized herein shall be used to acquire public works already operated by public or private agencies, except where funds are allotted for substantial additions or improvements to such public works and with the consent of the owners thereof * * *."

## STATEMENT OF THE CASE

The subdivision of Belle Haven, in Fairfax County, Virginia, was developed by respondent Belle Haven Realty Corporation beginning about 1925. In accordance with the contracts between the Realty Corporation and the purchasers of lots, the corporation installed, progressively with the development of the subdivision, a sanitary sewer system. This was a completely integrated and independent system with its own outfalls into the Potomac River (R. 37). The deeds to the purchasers of lots conveyed all "appurtenances", and they referred to certain restrictive covenants which included a prohibition against septic tanks (See typical deed at R. 16). The system was paid for by the lot owners, pro rata, as part of the purchase price of their lots (R. 37).

About 1942 the Federal Works Agency commenced construction of a large sewer project to serve other areas of Fairfax County which were then being built up in order to house defense workers. This system (herein sometimes referred to as the "trunk system") had its outlet in the Potomac River east of the hill occupied by Belle Haven. About 1944 a lateral line was run by the Federal Works Agency from Fair Haven, a subdivision to the west of Belle Haven, into the trunk line. This lateral was cut into the west outfall line of the Belle Haven system, running along the foot of Belle Haven hill; and thereupon the Federal Works Agency, without knowledge or consent of the

abutting property owners, blocked off the original outfalls of the Belle Haven system and diverted its sewage through the main outlet of the trunk system (R. 35). As described in the affidavit of Edward S. Holland, Civil Engineer:

> "The trunk system is thus a gravity system running past the foot of Belle Haven hill. The only benefit from an engineering standpoint received by the trunk system from the Belle Haven system was the convenience of flowing the Fair Haven sewage through portions of the Belle Haven west outfall. The taking of the main Belle Haven system in 1948 contributed nothing whatever from an engineering standpoint to the trunk system, and was totally unnecessary for the construction or operation of the trunk system. The Belle Haven system gained no benefit whatever from being connected to the trunk system." (R. 34).

Despite the fact that the Belle Haven system was unrelated to and unusable by the trunk system, the Government on April 8, 1948, petitioned[3] for condemnation of the Belle Haven system (R. 9); and title was taken immediately under the Declaration of Taking Act. On March 4, 1949, the Belle Haven system was covered under a pre-existing lease of the trunk system to Fairfax County. The trunk system and the Belle Haven system have since been sold to Fairfax County.

None of these transactions regarding their sewer system was consented to by the Belle Haven property owners. After the Belle Haven outfalls had been blocked off by the Federal Works Agency, respondent Belle Haven Realty Corporation consented to the condemnation on condition that no charge would be made against the then or future owners of property in Belle Haven for the use of their own sewer system (R. 33, 37).

The Belle Haven sewer system was maintained by the

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[3] The taking was by an "Amended Petition", amending a petition originally filed in 1944 and providing for an easement of flowage for the Fair Haven sewage (R. 1).

Belle Haven Realty Corporation without charge to the property owners until it was taken over by the Federal Works Agency (R. 37). Even prior to the inclusion of the Belle Haven system in its lease Fairfax County attempted to charge the Belle Haven property owners two dollars ($2.00) a month as a sewer service charge. This amount was substantially in excess of the reasonable cost of operation and maintenance, and the surplus was, pursuant to the lease from the Federal Works Agency, to be applied by Fairfax County against its purchase price of the trunk system (R. 38). Upon the attempt to collect such a charge the property owners in Belle Haven, through the named intervenors below, moved for leave to intervene in the condemnation proceeding (R. 10, 13), in which only the Belle Haven Realty Corporation was originally named as defendant. Over the Government's objection the District Court granted the motions to intervene, and the property owners filed answers (R. 11). Quoting here from the opinion of the District Court:

> "In their answers, intervenors waived any claim to monetary reimbursement provided the court included in its judgment of taking a stipulation that neither they, nor other lot owners similarly situated, be required to pay any service charge greater than enough to defray the costs of maintenance and operation of their sewer system: that is, that they be protected from being required to pay any part of the amortization of the cost of the trunk line or other part of the sewer system. The Government's motion to strike out this prayer raised the question of whether or not this court could, over its protest, impose such a limitation on the Government's taking.
>
> Inasmuch as the Belle Haven householders had a sewer system ample for their needs, which they had paid for as part of the purchase prices of their lots, the contention of the intervenors did not seem to me unreasonable. However, I came to the conclusion that, without its consent, under the law I was powerless to impose any such limitation or condition on the Government's taking. This opinion is reported as *United*

*States* v. *Certain Parcels of Land in Fairfax County, Virginia, et al.* (*Davis, Intervenor, et al.*), 89 F. Supp. 571.

> The intervenors, being allowed to amend their answers, have filed answers * * * directly attacking the authority of the Government to acquire their sewer system by condemnation and praying that the Government be required to restore their sewer system to the condition in which it was before the Government's taking." (R. 38-39).

The property owners contended that Title II of the Lanham Act (the basic authority relied on by the Government for the taking) did not authorize condemnation of an existing utility; and that furthermore such a taking was affirmatively forbidden by the 1943 amendment to the Act. The District Court set aside the taking on the second ground (R. 40), without passing upon the first (R. 39). The Court of Appeals affirmed on both grounds. The petition for certiorari was based primarily on neither ground, but upon an assertion by the Government that the decision below was grounded on a broad rule of construction which has been rejected by this court.

## SUMMARY OF ARGUMENT

### I.

In its petition for certiorari the Government attempted to interpret the decision below as being that

> "a general power of condemnation does not authorize the condemnation of property already legally appropriated to a public or quasi-public use, in the absence of legislative authority expressly given or necessarily implied."

The opinion below does contain such a statement (R. 47); apparently the court overlooked the distinction noted by this court in *United States* v. *Carmack*, 329 U. S. 230, 243, fn. 13, as between takings by public utilities and by the sovereign. Respondents submit, however that the above-

quoted sentence was plainly immaterial to the decision of the Court of Appeals, which would presumably have deleted it on an appropriate motion. A reading of the opinion indicates that the statement was made, merely in passing, as a premise for an "a fortiori" conclusion which must, we think, be indisputable, namely, that

> "* * * a general power to condemn lands may not be construed to authorize the condemnation of a public works system merely because easements in land are appurtenant thereto." (R. 47).

This point, which was not mentioned by the District Court, will not be further considered by respondents on brief.

## II.

The taking of an existing utility was not authorized by Title II of the Lanham Act. Section 202 of the Act provided, in subsection (a), for the acquisition of

> "improved or unimproved lands or interests in lands by purchase, donation, exchange, lease * * * or condemnation * * * for such public works."

Subsection (b) provided for the construction of public works

> "on lands or interests in lands acquired under the provisions of subsection (a) * * *."

The statutory scheme thus provided for the acquisition, under (a), of land upon which to *construct* public works under (b). Congress had no thought that utilities already operating could be acquired under (a). If there can be doubt of this on the face of the Act, it is readily dispelled by the legislative history. The sole purpose of this defense statute was to provide public services in areas congested by the defense effort where no such services, or inadequate ones, existed.

Furthermore, the findings by the President which were statutory prerequisites for any acquisition under the Act were not made here.

## III.

In any event, the taking was, under the circumstances, expressly forbidden by the 1943 amendment to the Lanham Act. The District Court rested its decision on this ground alone.

The amendment in question was to the appropriation provision of the Act, and provided that:

> "* * * none of the funds authorized herein shall be used to acquire public works already operated by public or private agencies, except where funds are allotted for substantial additions or improvements to such public works and with the consent of the owners thereof * * *."

As indicated by its legislative history the basic prohibition contained in this proviso was declaratory of the intent of Congress with respect to original Title II, while the excepting clause was intended to open the door to acquisition of existing public works in a few isolated cases where everybody concerned might consent.

For the reasons indicated by both courts below, the conditions attached to the operation of the excepting clause were not satisfied here. There was no allotment of funds for additions or improvements to the Belle Haven sewer system—there were no additions or improvements of any sort to the system. Nor was the consent of the owners obtained. The Realty Corporation, which held legal title to the system, finally consented on condition that no service charges be imposed against the then or future owners of property in Belle Haven for the use of their own system. When the Government's lessee, Fairfax County, commenced to charge the property owners two dollars a month for such use this condition was obviously violated. No consent whatever was obtained from the property owners who

Lanham Act. This is also what the court below held.

Moreover, it will be noted from the opinion in the First Circuit that there is still another reason why the taking of the Belle Haven sewer system could not be sustained in any event, and why the decisions in both circuits are to the same effect. Even if this taking had been otherwise authorized under the Lanham Act, the stated prerequisites to any taking under that Act were not complied with. The Act requires (section 202, *supra* p. 2) certain findings by the President which were not made either in the *Puerto Rico* case or here. Here the only action by the President relied upon by the Government below in this regard was his letter of March 11, 1942 (R. 39). Even if this letter could be considered as finding a shortage of sewer facilities six years later in Belle Haven (where there was at no time any such shortage in fact, R. 16) it is identical—in substance—to the letter of the President involved in the *Puerto Rico* case where it was expressly held insufficient (131 F. 2d 496, n. 5).

## CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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September 1952

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On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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## BRIEF FOR RESPONDENTS

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## BRIEF FOR RESPONDENTS

### OPINIONS BELOW

The opinion of the Court of Appeals (R. 43) is reported at 196 F. 2d 657. The several opinions of the District Court are reported at 89 F. Supp. 567 (R. 24), 89 F. Supp. 571 (R. 18), and 101 F. Supp. 172 (R. 36).

## JURISDICTION

The judgment of the Court of Appeals was entered on May 10, 1952 (R. 50). The petition for writ of certiorari was filed on August 5, 1952, and was granted on October 13, 1952. The jurisdiction of this court is invoked under 28 U. S. C. 1254(1).

## QUESTIONS PRESENTED

1. Whether the condemnation of an existing utility was authorized by Title II of the Lanham Act.[1]

2. Whether, if condemnation of an existing utility was authorized by Title II of the Lanham Act, the statutory prerequisites for such a taking were complied with in taking the Belle Haven sewer system.

3. Whether the taking of the Belle Haven sewer system was prohibited by the 1943 amendment to the Lanham Act expressly forbidding acquisition of existing public works "except where funds are allotted for substantial additions or improvements to such public works and with the consent of the owners thereof," where

a) the record showed no allotment of funds for additions or improvements to the Belle Haven sewer system; and

b) the corporate holder of legal title consented to the taking only on a condition not fulfilled, and no consent was given by the abutting property owners who paid for the system and are required to use it.

## STATUTES INVOLVED

Act of October 14, 1940 (Lanham Act), Title II, section 202, as added June 28, 1941, 55 Stat. 362, 42 U.S.C. 1532:

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[1] Act of October 14, 1940, Title II, sec. 202, as added June 28, 1941, 55 Stat. 361-363, 42 U.S.C. 1531-1534.

"Whenever the President finds that in any area or locality an acute shortage of public works or equipment for public works necessary to the health, safety, or welfare of persons engaged in national-defense activities exists or impends which would impede national-defense activities, and that such public works or equipment cannot otherwise be provided when needed, or could not be provided without the imposition of an increased excessive tax burden or an unusual or excessive increase in the debt limit of the taxing or borrowing authority in which such shortage exists, the [Federal Works Administrator][2] is authorized, with the approval of the President, in order to relieve such shortage—

"(a) To acquire * * * improved or unimproved lands or interests in lands by purchase, donation, exchange, lease * * * or condemnation * * * for such public works.

"(b) By contract or otherwise * * * to plan, design, construct, remodel, extend, repair, or lease public works, and to demolish structures, buildings, and improvements, on lands or interests in lands acquired under the provisions of subsection (a) of this section or on other lands of the United States which may be available, * * * provide proper approaches thereto, utilities, and transportation facilities, and procure necessary materials, supplies, articles, equipment, and machinery, and do all things in connection therewith to carry out the purposes of this subchapter.

"(c) To make loans or grants, or both, to public and private agencies for public works and equipment therefor, and to make contributions to public or private agencies for the maintenance and operation of public works, upon such terms and in such amounts as the Administrator may consider to be in the public interest. As used in this paragraph, the term 'private agency' means any private agency no part of the net earnings of which inures to the benefit of any private shareholder or individual."

[2] During all times relevant here the cognizant official was the Federal Works Administrator. The statute now reads "Housing and Home Finance Administrator."

had paid for the system and are, as the Court of Appeals said, "as truly the real owners of that system as if it had been built by them as a cooperative enterprise". (R. 50).

## Argument

### I.

### THE PRESENT TAKING WAS NOT AUTHORIZED BY ORIGINAL TITLE II OF THE LANHAM ACT.

The basic statutory authority claimed for the taking is Title II of the Act of October 14, 1940, as added by the Act of June 28, 1941, 55 Stat. 361-363, 42 U. S. C. 1531-1534. This legislation is known as the Lanham Act. The relevant provisions are in section 202 of the Act (42 U. S. C. 1532), and are set out above at pages 2-3.

#### A. Title II of the Act did not authorize the taking of an existing utility.

Section 202(a) of the Act authorized the Federal Works Administrator, with the approval of the President, to acquire:

> "improved or unimproved lands or interests in lands by purchase, donation, exchange, lease * * * or condemnation * * * for such public works."

Subsection (b) provided for the construction of public works

> "on lands or interests in lands acquired under the provisions of subsection (a) * * *."

The statutory scheme contemplated the acquisition, under (a), of land upon which to construct public works under (b). Petitioner contends that "improved lands" literally covers lands "improved" by an operating utility (Brief for Petitioner, p. 11). This seems to suggest such an extreme stretching of "improved" as to be unacceptable on its face, particularly since

> "* * * it is to be borne in mind that the taking of private property for public use is deemed to be against the common right and authority so to do must be clearly expressed." *Delaware, L. & W. R. Co.* v. *Morristown*, 276 U. S. 182, 192 (1928).

Petitioner's argument would ultimately encompass the taking of anything built on land, no matter how extensive, if it might have some present or future connection with "public works". In any event, the history of the Lanham Act, both prior and subsequent to the enactment of Title II in 1941, demonstrates that Congress did not intend to authorize any such taking.

1. *The history of the Lanham Act.*

The original Lanham Act (now Title I thereof) was the Act of October 14, 1940, 54 Stat. 1125-1126, 42 U. S. C. 1521-1524. Section 1 of the Act states its purpose as being

> "to provide housing for persons engaged in national-defense activities * * * in those areas or localities in which the President shall find that an acute shortage of housing exists or impends which would impede national-defense activities * * *."

It was soon found necessary to supplement the defense housing program by providing also public services for the congested areas. This was the purpose of the statute now before the court, see the preamble to section 202, at page 3, above.

Title II was drafted upon the pattern of Title I. Two bills, H. R. 3213 and H. R. 3570, originally introduced for the purpose, were redrafted as H. R. 4545, 77th Cong. 1st sess. H. R. 4545 became the final vehicle for the legislation. At the hearings the General Counsel to the Federal Works Agency testified with respect to H. R. 3213, whose wording was substantially the same, for present purposes, as in the final Act. He stated:

"And then authority is given to acquire land, improved or unimproved, and *upon the land so acquired to construct public works*, to maintain them and operate them, administer them, to sell them, to transfer them, and also to make loans and grants for all these purposes."[4] (Emphasis supplied.)

Nowhere in the legislative history is there intimation that Congress was even requested to authorize the taking over by the Federal Government of public utilities. Any such request would of course have stirred up the issue of public versus private power, and would never have been granted without voluminous discussion. Throughout the debates there was evidenced a serious concern by Congress lest authority for construction of schools might lead in some way to attempts by federal agencies to control their operation.[5] It seems plain that Congress would have rejected out-of-hand any proposal to authorize federal officials to take over local utilities. It also seems plain that the Federal Works Agency did not regard its proposal as having any such far-reaching consequences. As indicated above, its general counsel understood that the bill provided for the acquisition of land upon which to construct public works. And in 1943 the Administrator, in reporting to Congress on the operation of Title II, stated:

"*Authority of the Federal Works Administrator under Title II.*

Under title II the Federal Works Administrator is authorized:

(1) To *construct* community facilities as Federal projects.

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[4] Hearings before Committee on Public Buildings and Grounds on H.R. 3213 and H.R. 3570, 77th Cong. 1st sess. 59 (Testimony of Alan Johnstone, General Counsel, Federal Works Agency).

[5] This concern resulted in section 203(b), 55 Stat. 362, 42 U.S.C. 1533(b).

(2) To make loans or grants, or both, for the non-Federal construction of community facilities.

(3) To make contributions for the maintenance and operation of community facilities.

Loans, grants, and contributions may be made to public and private agencies, private agencies being defined as 'any private agency no part of the net earnings of which inures to the benefit of any private shareholder or individual.'" (Memorandum of Philip B. Fleming, Federal Works Administrator, attached to Report of Senate Committee on Public Buildings and Grounds, on H. R. 2936, Rep't. No. 376, 78th Cong. 1st sess., p. 3.) (Emphasis supplied.)

Finally, we have an express statement by Congress itself as to its intent which, while subsequent to the Act, appears to be authoritative. This resulted from an attempt by the Federal Works Agency to condemn, under Title II, an electric system in Puerto Rico. In 1942 the United States Court of Appeals for the First Circuit dismissed this condemnation, holding that the taking of an operating utility was not authorized by the Lanham Act. *Puerto Rico Ry. Light & Power Co.* v. *United States,* 131 F. 2d 491 (1st Cir. 1942). In 1943, in connection with a bill increasing the appropriation authority under Title II, Senator Taft offered an amendment providing in part that

"none of the funds authorized herein shall be used to acquire public works already operated by public or private agencies."

Senator Taft (who had been a member of the Committee on Public Buildings and Grounds, which had cognizance of the Lanham Act) explained his amendment as follows:

"Mr. President, the first clause of the Amendment provides 'that none of the funds authorized herein shall be used to acquire public works already operated by public or private agencies.'

"When the subcommittee of the Committee on Territorial and Insular Affairs were in Puerto Rico we

found that the F. W. A. took 10 million of this rather limited fund intended for the construction of works in connection with the housing in industrial areas and used it to acquire all the power companies of Puerto Rico, the San Juan Power Company and the Mayaquez Power Company. So far as I can see there was no real justification for that. As a matter of fact, the Federal Circuit Court in Boston subsequently held that there was an illegal application of those funds.

"I do not mean to say that it might not be desirable for the insular government, which owned a good many of the power facilities, the dams and the like, to take over the private power companies and consolidate them all into one system, but *certainly there was nothing in the Lanham Act which authorized any such proceeding. It was intended to provide new facilities, it was not intended to provide for taking over old facilities. I think it is perfectly clear that no such power should be included in the Act.*" (Emphasis supplied.) 89 Cong. Rec. 7286.

Senator Maloney, who was in charge of the pending bill, and had been in charge of the Lanham Act, replied as follows:

"Mr. President, I can see no objection to the amendments offered by the Senator from Ohio. I agree with him that Lanham Act funds, at least in my opinion—and I was one of those who helped to write the Act—were not intended to be used for such a purpose as the acquisition of a public utility in Puerto Rico. So I have no objection to the language and as a matter of fact I share the feeling of the Senator from Ohio." Id. at 7287.

The following day the excepting clause came into the amendment on further motion of Senator Taft, who stated:

"Mr. President, yesterday I offered an amendment which was agreed to. The Public Works Ageney objects to the limitation which provides 'that none of the funds authorized herein shall be used to acquire public utilities already operated by public or private agencies.'

"When the amendment was offered, I referred to the Puerto Rican case. The Public Works Agency cites a case of a railway connection with a naval plant in one of the western states where they must have the railroad in order to complete the whole railway project which the Navy desires. The railroad is worth, let us say, $1,000,000, and they are to put in $2,000,000 in order to complete the project. They have asked that in a case of that kind they be authorized to take over the existing work, where they are enlarging it. Even in such cases I do not think the authority should be given except with the consent of those who own the existing public works. Therefore I agree to an amendment so that the amendment would read: [Final form]." 89 Cong. Rec. 7314.

Senator Maloney was in charge of the 1943 bill, and had been in 1941 chairman of the committee reporting out Title II of the Lanham Act. His concurrence in Senator Taft's view that the Act "was not intended to provide for taking over old facilities" is authoritative. The opinion of the committeeman in charge of a bill is on a par with the committee report as authentic legislative history. *Duplex Printing Co.* v. *Deering*, 254 U. S. 443, 475 (1921); 2 Sutherland, *Statutory Construction* (3rd ed., Horack, 1943) sec. 5012.

We submit that it is clear that Congress did not intend at any time to authorize the condemnation of an operating utility under the Lanham Act (except in an isolated case as provided for in the excepting clause of the 1943 amendment).

**B. The statutory prerequisites to a taking under Title II were not complied with here.**

The Act provides that

"*Whenever the President finds* that in any area or locality an acute shortage of public works * * * exists * * * the Federal Works Administrator is authorized,

*with the approval of the President,* in order to relieve such shortage—

(a) To acquire * * * improved or unimproved lands or interests in lands * * *." (Emphasis supplied)

Thus the President was here required to "find" in the first instance an acute shortage of public works in the "area" of Belle Haven; in addition, he was required to "approve" the particular means adopted by the Federal Works Administrator to relieve such shortage.

Congress was insistent that both such safeguards be in the statute, see 87 Cong. Rec. 5090-5093; and it was assured by Senator Maloney that

> "The bill provides that it shall be administered by the Federal Works Administrator, although it also requires that whatever he does must be with the approval of the President of the United States, and that nothing may be done except with the President's approval. (87 Cong. Rec. 5090.)
>
> * * * * *
>
> Mr. Bone: Let me understand if this assumption is correct, that under the bill the President will define the defense areas, and having made such definition, the sole discretion to give or withhold grants-in-aid or outright grants will vest in the Administrator. Is that correct?
>
> Mr. Taft: Under the bill he is authorized, with the approval of the President, to do these various things; so that the President must approve.
>
> Mr. Maloney: The President has sole discretion, as a matter of fact." (87 Cong. Rec. 5093.)

Here the only finding made by the President could have had no relation to Belle Haven; and the petitioner concedes that the President did not approve this taking, contending that such approval was unnecessary under the circumstances. (Brief for Petitioner, p. 25).

*1. There was no finding of a shortage of sewer facilities in Belle Haven or which the Belle Haven system could alleviate.*

The only action by the President which is relied on as showing compliance with the Act was his letter dated March 11, 1942 (R. 36), finding an "acute shortage of public works" in "various" places in Fairfax County (an area of over four hundred square miles). It is difficult to see how this finding could have had any relation to Belle Haven. As has been seen, there was no shortage of sewer facilities in Belle Haven itself, and a sewer system on top of Belle Haven hill was not usable by the trunk system running past the foot of the hill and operating by gravity alone. Moreover, the original petition for condemnation, filed on December 13, 1944 (R. 1), encompassed merely a right of way through the west outfall of the Belle Haven sewer system, at the foot of the hill. The main Belle Haven system was not taken until April 8, 1948, under a second Amended Petition. (R. 9). It is apparent that the taking of the Belle Haven system was an afterthought and that no finding was made with respect to it.

*2. The President never approved the taking of the Belle Haven system.*

Not only was there no preliminary finding in relation to the Belle Haven system, but the taking was never approved by the President as an appropriate means for relieving the condition found to exist elsewhere in Fairfax County. As stated by the First Circuit in the Puerto Rico case:

> "* * * From the text of the act and from the legislative history we are satisfied that the President is required to approve at least in main outline the particular plan, program, or project formulated by the Administrator for the relief of the defined shortage of public works or equipment therefor, before the Administrator is authorized to proceed. It is not enough that the President, after finding the existence of an

acute shortage of public works in a given area or locality, should give the Administrator authority, carte blanche, to relieve such shortage by any of the various methods described in § 202 which the Administrator might thereafter deem expedient." *Puerto Rico Ry. Light & Power Co.* v. *United States*, 131 F. 2d 491, 495.

Here the only "approval" suggested is the last sentence of the President's letter. This letter was identical to the President's letter involved in the Puerto Rico case, where it was held insufficient, 131 F. 2d 496, n. 5. This carte blanche authority was clearly not an "approval", even "in main outline", of the taking of an existing sewer system six years later.

## II.

## THE TAKING WAS EXPRESSLY FORBIDDEN BY THE 1943 AMENDMENT TO THE LANHAM ACT.

### A. There was no allotment of funds for additions or improvements to the Belle Haven sewer system.

The District Court rested its conclusion that the taking was unauthorized on the 1943 amendment to the appropriations provision of the Lanham Act, which provided as follows:

> "None of the funds authorized herein shall be used to acquire public works already operated by public or private agencies, except where funds are allotted for substantial additions or improvements to such public works and with the consent of the owners thereof * * *." (Act of July 15, 1943, 57 Stat. 565, 42 U. S. C. 1534, note.)

The District Court stated:

> "* * * It appears to me that the Belle Haven sewer system was undoubtedly 'public works already operated by' a private agency. If that be true, even though it be conceded for the sake of argument, that funds were allotted for substantial additions or improvements, was the taking with 'the consent of the

owners thereof?' I should think that the consent referred to would mean an unconditional consent, and intervenors contend that the consent of Belle Haven Realty Corporation was only a conditional consent. However, even if it be conceded that the necessary consent was obtained from Belle Haven Realty Corporation; was that sufficient? The Government's brief and amendatory paragraph refer to Belle Haven Realty Corporation as the '*purported owner*'. There is no such language as that in the statute. The statute says '*consent of the owners.*' Assuming the correctness of my previous holding that the property owners who had purchased from Belle Haven Corporation owned easements in and to the sewer system, were they not also owners *pro tanto* of the sewer system? If the property owners were in fact part owners of the sewer system, no consent having been obtained from them, how can the Government's taking be justified?" (R. 39-40).

The petitioner, in its brief to this court, limits its discussion to the requirement of "consent of the owners." It does not discuss the further limitation, i.e., "where funds are allotted for substantial additions or improvements to such public works", except to say that it involves a question of fact which has not been determined (Brief for Petitioner, p. 24). The record on this point consists of allegations by the intervening property owners (R. 12), supported by an engineer's affidavit (R. 34), and not controverted by the Government. These allegations are to the effect that there were not only no "substantial" additions or improvements to the Belle Haven system, but absolutely *no* additions or improvements to that system. The only things that happened to it were that the Federal Works Agency illegally diverted to its own use one of Belle Haven's outfalls, blocked off both outfalls, and flowed the Belle Haven sewage into the river through the Government's main instead of Belle Haven's main. There has been no suggestion that Belle Haven's outfalls were not entirely adequate for its sewage. The District Court found that

"the Belle Haven subdivision had a completely integrated sewer system with outfalls into the Potomac River" (R. 37); and that "the Belle Haven householders had a sewer system ample for their needs" (R. 38).

The District Court made no finding on this point, stating that

> "even though it be conceded for the sake of argument, that funds were allotted for substantial additions or improvements, was the taking with the 'consent of the owners thereof'?" (R. 39).

We submit that the question was properly before the court on a motion to dismiss. Like the consent of the owners, this point involved an express condition precedent to any taking of an existing utility, yet the petitioner failed to plead compliance with either condition. It is well settled that, where a statute authorizes condemnation of private property only after certain conditions are satisfied, the satisfaction of such conditions must be pleaded and shown. *Puerto Rico Ry. Light & Power Co.* v. *United States*, 131 F. 2d 491, 496 (1st Cir. 1942); *Cincinnati* v. *Vester*, 281 U. S. 439 (1930); *Miss. and Rum River Boom Co.* v. *Patterson*, 98 U. S. 403, 406 (1879). We accordingly submit that the dismissal was proper for this reason, as well as for the lack of consent.

**B. The "consent of the owners" was not obtained.**

The petitioner contends that the consent of respondent Belle Haven Realty Corporation to the taking was obtained and that the consent of respondent property owners was unnecessary.

*1. The consent of the corporation was given on a condition which was violated by the petitioner.*

After the Belle Haven outfalls had been blocked off the Realty Corporation agreed to condemnation of the rest of

the system on condition that no service charges be imposed against the then or future owners of property in Belle Haven for the use of their own system. (R. 37). When petitioner's lessee, Fairfax County, commenced to charge the property owners two dollars a month for the use of their sewer system (R. 38), this condition was obviously violated. It seemed to the District Court, and now seems to respondents, perfectly clear that the petitioner could not bring itself within the exception on the basis of a conditional consent where the condition was not fulfilled.

An essentially similar situation was before the Fourth Circuit in *United States* v. *Southern Power Co.*, 31 F. 2d 852 (1929). There the Federal Government condemned for forestry purposes land which was traversed by power lines; and agreed with the power company

> "that when the Government had obtained title, it would grant a permit to defendant for a nominal consideration, authorizing it to continue to maintain its right of way and operate its power lines over the land condemned. . . .
>
> "No permit has been granted to the defendant under the agreement; and the Government is now asking that defendant be enjoined from maintaining its power transmission lines over the lands in question, unless and until it shall apply to the Federal Power Commission for a permit, and shall agree to the conditions to be prescribed by that Commission." 31 F. 2d 853.

The court concluded that the statutes under which the Government was proceeding in that case did not authorize the taking of defendant's rights-of-way, and then said:

> "Finally, we think that the injunction was properly denied, because the Government, not having complied with its agreement to grant a use permit to defendant, is not in a position to invoke the aid of a court of equity." 31 F. 2d 858.

*2. The owners of property in Belle Haven were "owners" of their sewer system within the meaning of the amendment.*

The owners of lots in Belle Haven paid for the sewer system, pro-rata, as part of the purchase price of their lots (R. 37). The lot-owners accordingly alleged that they were in equity the owners of the system (R. 30-31). The District Court concluded that in any event they had easements appurtenant in the system; and on that basis the court stated that

> "I do not feel any doubt that they were included amongst the 'owners' of the property sought to be acquired." (R. 40).

The Court of Appeals agreed that the petition was properly dismissed on this ground, stating:

> "We think that this was correct, whether the ownership of the system be regarded as being in the Realty Corporation or in the lot owners who had paid for it and whose rights and easements constituted the only real value that it had. The lot owners could not be deprived of these rights and easements without just compensation; and it is reasonable to interpret the consent required by the statute as applying to them as well as to the Realty Corporation which had built the system but whose interest therein no longer had any appreciable value." (R. 48-49).

The petitioner contends here that it would be absurd to consider all the users of a utility as its "owners." (Brief for Petitioner, pp. 19-22). This seems to be beside the mark. Ordinarily the users of a utility have not paid for it, are not required to use it, and do not have easements in it.

We submit that the lot owners, who had paid for the Belle Haven system, were "owners" of the system, in equity. Even without their easements they would have been entitled to share in any condemnation award.

> "It is settled that when a parcel of land is taken by eminent domain, every person having an estate or interest at law or in equity in the land taken is entitled to share in the award. The term 'owner' in statutes relating to the exercise of eminent domain includes any person having a legal or equitable interest in the property condemned. A mortgagee of real property sought to be condemned or a mortgagee's assignee or grantee is 'owner' or 'person interested in property', and as such and to the extent of the interest is entitled to share in the distribution of the compensation judgment." *Swanson* v. *U. S.*, 156 F. 2d 442, 445 (9th Cir. 1946), *cert. denied*, 329 U. S. 799 (1947).

Or if the lot owners had only easements in the system, which is the least they had, such easements were ownership interests. *U. S.* v. *General Motors Corp.*, 323 U. S. 373, 377-378 (1945); *U. S.* v. *Welch*, 217 U. S. 333 (1910); *U. S.* v. *Sunset Cemetery*, 132 F. 2d 163, 165 (7th Cir. 1943); *U. S.* v. *Certain Lands at Great Neck*, 49 F. Supp. 265 (E. D. N. Y. 1943).

We accordingly submit that under any statute relating to condemnation the owners of easements appurtenant would be included within the term "owners." Here that result would seem to be particularly required in view of Congress' expressed opposition to takings of operating utilities. We submit that Congress would obviously have been shocked at even the suggestion of a taking, with Lanham Act funds, which would deprive an established residential community of its operating sewer system without its consent.

## CONCLUSION

Respondents submit that the taking of the Belle Haven sewer system was not authorized by the Lanham Act, and was affirmatively forbidden by the amendment to that Act in 1943. The judgment below should be affirmed.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

OCTOBER TERM 1952

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No. 253.

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UNITED STATES OF AMERICA, *Petitioner*,

v.

CERTAIN PARCELS OF LAND IN THE COUNTY OF FAIRFAX, Commonwealth of Virginia, and Belle Haven Realty Corporation, et al.

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**On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

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## PETITION OF RESPONDENTS FOR REHEARING

Respondents respectfully petition for a rehearing on the ground that the decision (rendered on April 6, 1953) is rested upon the setting aside of a finding of fact of the District Court, with nothing whatsoever in the record to support such an action. Respondents submit that on the basis of that finding the decision below should be affirmed on rehearing. In any event, they earnestly submit that the most this court can properly do, if it questions the basis of the finding in question, is to remand the case for a trial on the point.

The finding of fact in question is that the consent of respondent Belle Haven Realty Corporation to the taking of the sewer system was given on the express condition that no service charges be imposed on the Belle Haven property owners for the use of their own system. The Court of Appeals stated:

> "If, however, we look to the Realty Corporation alone, the consent necessary to acquisition by the Government is not shown, since its consent was given upon a condition which the Government is unwilling to accept. The Government contends that this appears merely from the answer of the corporation and has not been established by evidence. The judge found it as a fact, however, after hearing the parties in a number of pre-trial conferences." (R. 49).

This court in effect sets aside this finding of fact on the basis of a misapprehension as to the record. This court apparently understood that there was nothing before the District Court as to the nature of the corporation's consent except its answer, which could be construed as a matter of law. As indicated by the above excerpt from the opinion below, this is not correct.

The District Court conducted three hearings on this case. The first was on the motion of the Belle Haven property owners to intervene (R. 10). The second was on their motion for an injunction against the unauthorized service charges (R. 22). The third was a lengthy pre-trial conference which was attended not only by counsel but by official representatives of Fairfax County. Counsel included the attorney for the Realty Corporation, who had personally conducted the negotiations preceding the condemnation. As a result of the statements made during these proceedings, particularly the last, the District Court found (R. 37, 40) that the condition in question qualified the corporation's consent to the taking itself. There is no record to support a departure from that finding. Yet this court has in effect set it aside on the basis of a literal read-

ing of the wording of the corporation's answer and in the absence of a transcript of the pre-trial proceedings.

The Court's opinion construes the condition as directed only to the amount of compensation which could be claimed by the corporation. Even if it were so construed, it seems inconceivable that this court would permit the government to justify this taking on the basis of an agreement which it has admittedly failed to honor. It must be that counsel have failed to present this point clearly. That is why we presume to ask this further consideration by the court.

2. We submit that the most this court can properly do, if it questions the basis of the "finding" by the District Court in this respect, is to include this question within its remand, and require a trial on the facts. It is a part of the government's burden of proof in this case to prove the "consent of the owners." Such consent was a condition precedent to a taking under the statute. The government did not even plead such a consent. Assuming that it may now be allowed, in effect, to amend in order so to plead (see opinion of this court, page 6), still it remains for the government to *prove* the consent. Certainly it cannot do so by now pointing to a pleading which it says requires a conclusion different from that which the District Court reached after actually hearing the parties.

This court has remanded the case for a trial on other issues. It would be most unjust to foreclose this question, in the reverse of the conclusions below, particularly when there now must be a trial on the facts anyway.

## CONCLUSION

Respondents submit that there is no basis in the record or in fact for overturning the finding of the District Court as to the conditional consent of the Belle Haven Realty Corporation; and that accordingly the court should grant a rehearing and affirm the decision below on that ground.

In any event, if the court questions the basis for that finding, the government must prove at a trial that there was an unconditional consent, and the court's opinion should be amended so as to include this question within the scope of the remand.

Respectfully submitted,

FREDERICK A. BALLARD,
JOSEPH W. WYATT,
*Attorneys for Respondents.*

## CERTIFICATE OF COUNSEL.

I, Frederick A. Ballard, counsel for the respondents, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

FREDERICK A. BALLARD.

April 21, 1953.